(22,569.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 948.

CITY OF OWENSBORO, APPELLANT,

vs.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

INDEX.

	Original.	Print
Citation and service	*a*	1
Caption and parties	1	1
Bill of complaint	2	2
Exhibit "A"—Charter of Cumberland Telephone & Telegraph Co. of Kentucky	13	10
Subpœna in chancery and marshal's return	60	51
Restraining order	61	51
Motion for consolidation and order overruling motion	62	52
Restraining order and service	63	53
Demurrer to bill	66	54
Plea	74	59
Exhibit A—Transcript of record of Daviess circuit court in case of Cumberland Telephone and Telegraph Co. *vs.* City of Owensboro *et al*	95	74
Caption	95	74
Petition in equity	95	74
Answer of City of Owensboro	107	81
Exhibit A—Ordinance	119	89
Exhibit B—Ordinance	121	91

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 6, 1911.

	Original.	Print
Demurrer and reply	125	93
Judgment	130	97
Clerk's certificate	131	97
Opinion of Judge Owen	132	98
Motion for an injunction *pendente lite* and to dismiss bill	134	99
Demurrer to bill	135	99
Order overruling motion to dismiss bill	139	102
Motions to dissolve restraining order and dismiss bill	140	102
Order as to motion to fix hearing	142	103
Order withdrawing demurrer and motion to strike out certain parts of bill	142	103
Order sustaining motion to strike out parts of bill	148	107
Order overruling plea and demurrer	149	107
Order filing answer	150	108
Answer	151	108
Replication	160	114
Stipulation and order of submission	161	114
Deposition of James E. Caldwell	165	117
Decree	167	118
Order allowing appeal	169	119
Petition for an appeal	170	120
Assignment of errors	171	121
Appeal bond	175	123
Clerk's certificate	178	124

a UNITED STATES OF AMERICA,
Western District of Kentucky,
Sixth Judicial Circuit, Owensboro Division, ss:

To The Cumberland Telephone & Telegraph Company Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, D. C. on the *25th day of March next, pursuant to an Appeal allowed by the Circuit Court of the United States for the Western District of Kentucky, Owensboro Division, wherein City of Owensboro, Kentucky, is appellant, and you are appellee, to show cause, if any there be, why the Decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 27th day of February, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. America.]

WALTER EVANS, *Judge.*

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* Not exceeding 30 days from the day of signing.

Service of this citation accepted for appellee — February 28th, 1911.

CUMBERLAND TEL. & TEL. CO.,
By CLARENCE M. FINN, *Attorney.*

1 Proceedings in the Circuit Court of the United States for the Western District of Kentucky, Owensboro Division, at a Regular Term Begun and Held at the Federal Court Hall in the City of Owensboro, on Monday, November 28th, 1909.

Present, Honorable Walter Evans, sitting as Circuit Judge.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF OWENSBORO, KENTUCKY, Defendant.

Be it remembered, that heretofore, viz., on the 27th day of January, A. D. 1909, came the complainant, Cumberland Telephone & Telegraph Company, by William L. Granberry and Clarence M. Finn, its counsel, and filed in the Clerk's office of our said court its Bill of Complaint against the above named defendant.

The Bill of Complaint above referred to is as follows:

2 UNITED STATES OF AMERICA:

In the United States Circuit Court for the Western District of Kentucky, Owensboro Division.

In Equity.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY
v.
CITY OF OWENSBORO, KENTUCKY.

To the Honorable the Judges of the Circuit Court of the United States in and for the Western District of Kentucky, Sitting at Owensboro, Kentucky:

The Cumberland Telephone and Telegraph Company, a corporation organized under the and pursuant to the laws of the Commonwealth of Kentucky, and having its principal place of business in the city of Louisville, in said State, brings this, its bill of complaint, against the city of Owensboro, Kentucky, a municipal corporation created and existing under and pursuant to the laws of the Commonwealth of Kentucky; and,

I.

Thereupon, your orator complains and says that on the 8th day of June, 1883, it was duly incorporated under the laws of the Commonwealth of Kentucky, and that its charter has since been amended from time to time pursuant to the laws of said State; a copy of its charter and amendments *are* attached as Exhibit "A", but need not be copied in the issuance of process; that it was organized for the purpose of engaging in the telephone and telegraph business, and that it has continuously since its organization been engaged in such business, that it owns and operates more than five hundred telephone exchanges, in seven different States, including an exchange in the city of Owensboro, Kentucky. Its various exchanges are connected each with the other by more than 100,000 miles of toll lines and on July 1, 1908, the number of telephones in use by the sub-
3 scribers of your orator amounted to over 160,000, and any one or more of these subscribers can, with the aid of the toll lines, be connected with and converse with any other of the 160,000 subscribers.

The capital expended in constructing these connections, and which are given to your orator's subscribers, amounts to more than twenty million dollars, and the facilities cannot today be reproduced or duplicated for that amount of money, nor within less time than ten years. The toll lines of your orator radiating from the city of Owensboro, Kentucky, reach practically every point of importance and nearly every cross-road store in that section of the country, and these lines have been constructed from time to time at the request

of the business interests of said city, and for the purpose of making more valuable the plant and equipment of your orator in said city.

Your orator further states that the exchange at Owensboro is constructed by erecting at a central point in said city a building in which is located a switchboard, and from this board lines of small wire are carried upon poles to the business houses or residences of each subscriber and there connected with the telephone instrument. In this way each subscriber can signal the operator at the central office and receive connection with any other subscriber. For this character of service a monthly rental is paid, which entitled the subscriber to receive unlimited service from the local exchange. In the same manner, the toll lines are brought into the city, attached to the same poles, and connected to the switchboard, Any subscriber is entitled to signal the operator at the exchange and receive connection over the toll lines to other cities and places, and there be connected with any other of your orator's 160,000 subscribers. The only charge for this character of service is, generally speaking, one-half of one cent per air mile between the two cities thus connected for each three minutes of conversation. This is the exact rate charged non-subscribers who use the toll lines from the central
4 exchange; and your orator states that its toll lines entering and leaving the city of Owensboro, Kentucky, are erected and maintained along and on the same poles which carry the wires to the local subscribers.

II.

On December 4, 1889, the common council of the city of Owensboro, being the proper legislative body of said city, adopted an ordinance in the following words and figures, to-wit:

"Council Proceedings Dec. 4th, 1889.

Minute Book "F", Page 157.

The following ordinance, after being twice read, was enacted by the following vote, to-wit: Ayes, Mes. Borer, Brotherton, Vargeson, Cullon, Higdon, Decker, Notes, None. Viz:

Be it ordained by the Mayor and Common Council of Owensboro, Ky.:

That the Cumberland Telephone Company, its successors and assigns, is authorized and hereby granted the right to erect and maintain upon the public streets and alleys of said city *and* number of telephone poles of proper size, straight and shaved, smo-th, set plumb and set erect, and any number of wires thereon with the right to connect such wires with the building when telephone stations are established, provided that such poles shall be located and kept so as not to interfere with the travel upon said streets or alleys or the substantial use thereof by the inhabitants of said city.

SEC. 2. That the said Cumberland Telephone Company shall erect only one line of poles on a street, except for the length of one block

upon the street upon which the exchange building may be located, and where the wires of said company enter such exchange building the said company shall have the right to erect and maintain its poles on both sides of such street and the lowest wire of said telephone company shall not be less than twenty-five feet from the ground, except where such wires enter the exchange building or telephone stations.

Nothing in this ordinance contained shall be construed as an exclusive right to said company to erect and maintain said poles upon the streets and alleys of said city, and no obstruction shall be placed by said company to the erection and maintenance of poles by any other person or company. Such company shall enjoy such rights in common with all other persons or companies to whom said city may see proper to extend the same right.

SEC. 3. The said telephone company shall repair all streets and alleys it may enter upon and use for the purpose herein provided, which by the acts of said company or persons in its employ shall have become injured or damaged or been made unsafe.

All proper precautions and safeguards shall be used to prevent such use from becoming either injurious or annoying to the inhabitants of said city, and should any damage or injury result to any person or property by reason of the erection and maintenance of such poles, or the failure to keep the streets and alleys in repair as herein required, and said city shall be held liable by reason thereof, such company shall pay all damages and costs resulting therefrom to the parties injured, or to the city, if paid by her.

SEC. 4. The rights and privileges herein granted to said telephone Company are upon the terms and conditions following, viz:

5 That said company shall furnish free of charge one telephone for each engine or hose house, now erected or which may hereafter be erected by said city, one for police head-quarters, and one for the mayor's office, making at this time only two such telephones to be furnished by said company for the use of the city, — shall be kept in good order for constant use by said company.

Said company shall also allow the city the exclusive use of two feet of one arm on each pole for its fire alarm telegraph. The fire alarm telegraph poles of the city may be used by said company for its wires, provided such wires be kept two feet from the said fire alarm telegraph wires, and such poles used by said telephone company shall be replaced by it when needed.

SEC. 5. All poles of said telephone company shall be set close to the inner side of the sidewalk curbing.

SEC. 6. This ordinance may be altered or amended as the necessities of the city may demand.

This ordinance shall be in force from and after its passage."

Thereupon, pursuant to the *city* granted by the Mayor and common council of the said city of Owensboro, your orator did erect poles, string wires thereon, establish an exchange and offer the public a telephone service. The city erected its fire alarm wires on said poles, and has maintained the same there continuously

since; and your orator has installed telephones in the various city offices as required by said ordinance, and has maintained the same continuously since to the present time, and the same have at all times since they were installed to the present time been used freely by the city.

Said exchange not only embraces service within the corporate limits of the city of Owensboro, but extends throughout a large portion of Daviess County, in which said city is located, and subscribers located inside the corporate limits have the right to and do converse freely and for the same monthly charge — all patrons connected with the exchange outside of the corporate limits of said city, and likewise the subscribers outside are connected with and converse with the subscribers living in the corporate limits.

The exchange in the beginning was to a very great extent experimental, was not regarded as of much advantage or convenience by the citizens of said city, and the number of subscribers were few, but from time to time additional subscribers have been ob-

6 tained until January 1, 1909, when the number of subscribers connected to said exchange, having right to talk freely and at all times day and night between themselves, amounted to 1,137. From time to time as the number of subscribers increased, your orator has of necessity been compelled to erect additional poles and string additional wire to accommodate and serve the new subscribers obtained, which is essential and necessary in conducting a telephone business and operating a telephone exchange,—so that on July 1, 1908, and likewise at the present time, your orator has expended largely in excess of $100,000 in the construction of said exchange, and your orator charges that it could not be reproduced for a less amount at the present time; and that it has been built economically, prudently and skillfully.

Your orator charges that its operations in the city of Owensboro have almost from the beginning been disastrous, so that it has not in the aggregate earned as much as one per-cent upon the actual cost of its property in said city, nor has it during any one year since it has been operating said plant earned as much as five per-cent net upon the actual cost or value of its said plant.

During the past year, to-wit, 1908, it received the following revenue:

Exchange service	$25,990.50
Proportion of Tolls earned by exchan*echange*	1,403.26
Messenger	235.20
Miscellaneous	22.85
List ads	273.75
	$27,925.56

and during the same year, it paid out in expenses the following:

7 General:

Salaries & Wages	$951.39
Rent, light & Heat	40.14
Traveling	164.84
Postage, ptg. & Sta	6.80
Legal	1,050.70
Uncollectible	168.92
Incidental	213.44
	$3,704.06

Operating:

Salaries & Wages	$8,238.68
Rent, light and Heat	971.65
Postage, ptg. & Sta	104.80
Directory	312.90
Advertising & Canvassing	245.90
Messenger expense	202.85
Incidental	311.84
	$10,338.67

Maintenance:

Salaries & Wages	$4,995.33
Rent, light & Heat	390.83
Material	943.88
Traveling	1,335.54
Incidental	790.66
Damage and compensation	60.66
	$8,516.90

Instrument rental	$1,225.83
Insurance	261.10
Taxes	1,617.16
	$24,487.89

Your orator further states that the foregoing is the exact amount of money received from the operation of said exchange and the exact amount of money paid out by it in expenses in conducting said exchange; and nothing whatever is allowed therein for depreciation of its property, which your orator charges should be seven and one-half per-cent upon the actual costs of the property, less whatever amount was used during the year in re-constructing any part of the plant. From which it appears that your orator has a balance of $3,437.67 of revenue above the actual amount paid out by it, and if a fair amount for depreciation be added to the expenses, it will more than consume this balance of revenue.

8 So that your orator charges and it is a fact that your orator, on its present schedule of rates, is unable to earn any return

whatever upon the actual cost of its plant in the city of Owensboro, Kentucky.

The schedule of rates in force in the city of Owensboro during 1908 ranged from $3.75 per month for a business telephone to $2.50 per month, depending entirely upon the character of equipment and service which the patron desired; and its residence rates ranged from $2.00 to $1.50 per month.

In August, 1908, the common council of the city of Owensboro adopted an ordinance in the following language:

"An Ordinance Regulating the Charges for Telephone Service in the City of Owensboro.

Whereas, there has been irregularities in charges made by corporations or companies furnishing telephone service in the city of Owensboro, by which persons are often charged higher prices than others for the same service, and in the same locality, and,

Whereas, such prices are often exorbitant or unreasonable now, therefore, in order to regulate the same by establishing a uniform system of reasonable charge for said service.

Be it ordained by the common council of the city of Owensboro,

SECTION 1. That all companies, corporations, firms, or individuals, who are now operating, conducting and maintaining a telephone system in the city of Owensboro, and all companies, corporations, firms or individuals who shall hereafter maintain, operate or conduct a telephone system or service in the city of Owensboro, shall regulate the prices or charge for such service as hereinafter provided:

SECTION 2. For each telephone in a business house or office, the charge or price shall not exceed two dollars and fifty cents ($2.50) per month, or at the rate of thirty ($30.00) dollars per year; for each telephone in a residence, the charge or price therefor shall not exceed one dollar and fifty cents ($1.50) per month, or at the rate of eighteen dollars ($18.00) per year; for extension desk telephone, the price or charge therefor shall not exceed one dollar ($1.00) per month, or at the rate of twelve dollars per year, ($12.00) in addition to the regular prices herein before specified.

SECTION 3. It shall be unlawful for any corporation, company, firm or individual, furnishing telephone service within the city of Owensboro, to charge therefor an amount exceeding that fixed in this ordinance, and any violation hereof shall be punished by a fine of not less than ten dollars ($10.00), nor more than one hundred dollars ($100.00); and each charge in excess of the amount so fixed shall constitute a separate offense.

SECTION 4. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECTION 5. This ordinance shall take effect from and after its passage."

9 This ordinance was suspended from time to time until January, 1, 1909, when the same became effective; and in Jan-

uary, 1909, and during the past few days, another ordinance was duly adopted by the common council of the city of Owensboro, which is as follows:

"An Ordinance Requiring the Cumberland Telephone and Telegraph Company to Remove its Poles and Wires from the Streets in the City.

Be it ordained by the common council of the city of Owensboro:

SEC. 1. That whereas the Cumberland Telephone & Telegraph Company has heretofore erected numerous poles in the streets of the city of Owensboro, with wires attached thereto, and has maintained same without right, and whereas said poles and wires obstruct the use of said streets and are a nuisance therein, and it is desirable and beneficial to the city and the use of said streets that said poles and wires be removed therefrom:

It is ordained that same be removed and said company is hereby required to remove same within a reasonable time from the passage of this ordinance, and upon their failure to do so the Mayor is authorized and directed to have same removed, Provided, however, that said company shall have the right to purchase from said city a franchise authorizing it to maintain said poles and wires and use same as provided under the laws of the State, upon proper conditions to be prescribed by an ordinance to be passed upon request of said company to the common council of said City.

SEC. 2. All ordinances in conflict with this ordinance are hereby repealed.

SEC. 3. This ordinance shall take effect from and after its final passage."

Your orator charges that the rates adopted in said rate ordinance above set out are unreasonable, unjust, unfair, and confiscatory.

Your orator further charges that if said rates should be enforced, the revenues received during the past year would be decreased more than $3,000.00 per annum, and would compel your orator to operate said exchange for the benefit and convenience of the citizens of Owensboro, Kentucky, at an actual loss, without allowing any amount whatever for depreciation.

10 Your orator further charges that the ordinance above set out, and which was adopted in January, 1909, was intended to and does in fact attempt to repeal and repudiate your orator's right to do business in the city of Owensboro under said ordinance of December, 1889, and violates the obligation of said contract, and denies to your orator the equal protection of the law, contrary to the provisions of the constitution of the United States.

III.

Your orator further charges that its plant has been constructed honestly, economically and skillfully, and that its value and costs is reasonable, proper and right. Your orator further charges that it has operated said exchange honestly, prudently, economically

and skillfully and that the expenses cannot be reduced and were necessary and proper to be incurred; that its receipts cannot be increased without an increase in rates, and that the rates charged by it are not only not excessive, but are not sufficient to yield your orator a fair return upon its investment, nor are they commensurate with the value of the service rendered to your orator's patrons in the city of Owensboro, Kentucky.

Your orator further charges that the city officials before adopting said ordinance reducing its rates made no intelligent investigation, nor did they offer your orator any fair or reasonable opportunity of showing the real facts in regard to the cost, or operation, or return from said exchange; and your orator further charges that the city officials did not know, nor did they undertake to investigate, or ascertain, what the real facts were with respect to the cost, the receipts or disbursements of the said exchange, before adopting said ordinance. And your orator further charges that said city officials did not have information or knowledge sufficient or proper to enable them to determine what rates for telephone service in Owensboro were reasonable, proper or right.

11 IV.

Your orator further charges that the ordinance adopted in January, 1909, violates section 10, of article 1, of the Constitution of the United States, which provides, among other things, that—

"No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

and violates section 1 of article 14 of the Constitution of the United States, which, among other things, provides:—

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

V.

Your orator further charges that the enforcement of said ordinance will cause your orator irreparable injury and damage, and will destroy your orator's property and deprive it of its property without due process of law, and will deny to your orator the equal protection of the law.

Your orator further charges that the enforcement of said ordinance will impair the obligation of your orator's contract with the city of Owensboro.

And if your orator's poles and wires be removed, and the removal be wrongful, the same poles and wires cannot be used to restore the plant, but new poles and wires will have to be purchased and used for the new structure, thus entailing upon your orator the loss of the existing super-structure, and the cost of a new super-structure in addition. Its business in the interim will be interrupted and suspended; and damage incapable of computation will be inflicted upon it.

Your orator charges that the injuries hereinabove set out will be inflicted upon your orator by the city of Owensboro
12 unless restrained and prohibited by this honorable court and that such injuries and wrongs can only be prevented under the orders and decrees of your honors.

VI.

Forasmuch as your orator can have no adequate relief except in this court, and to the end therefore that the defendant, if it can, show why your orator should not have the relief hereby prayed for, and make answer to the matters hereinbefore stated and charged, your orator prays that your honor grant unto it a writ of subpœna of the United States of America directed to the City of Owensboro, commanding it on a certain day to appear and answer unto this bill of complaint, and to abide and perform such orders and decrees in the premises as the court shall seem proper and required by the principles of equity and good conscience.

And your orator further prays that a provisional or preliminary injunction be issued restraining the said defendant from any interference with the property of your orator, and any interference with its business in the city of Owensboro, Kentucky, and that it be restrained and enjoined from taking any action or interfering in any manner with the right of your orator to erect and maintain its poles and wires in the streets, alleys and public ways in the city of Owensboro, Kentucky, and from in any manner interfering with or distributing its vested rights, or from in any manner interfering with or seeking to impair the obligation of said contract.

And your orator further prays that upon a final hearing its right to conduct a telephone and telegraph business in the city of Owensboro, Kentucky, be declared and sustained; that its rights secured from the city of Owensboro to erect and maintain its poles and wires be declared and adjudged a valid and subsisting contract, and that the preliminary or provisional injunction be made perpetual. And that said ordinance be declared invalid, illegal and void.

And your orator prays for such other, further and general
13 relief as may to equity and good conscience belong.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

[SEAL.] By J. H. HUNTER, JR., *Secretary.*

CLARENCE M. FINN,
WM. L. GRANBERY,
FAIRLIEGH, STRAUS AND FAIRLIEGH,
Solicitors.

UNITED STATES OF AMERICA,
Middle Division of the Middle District of Tennessee:

Personally appeared before me the undersigned, John W. Hunter, Jr., who made oath in due form of law and states that he is Secretary

of the above named plaintiff, the Cumberland Telephone and Telegraph Company, and that the matters and things stated in the foregoing bill, as of his own knowledge, are true, and those stated upon information, he believes to be true.

J. W. HUNTER, JR.

Sworn to and subscribed before me this the 26th day of January, 1909.

[SEAL.] HARVEY D. JACOB,
Notary Public.

Exhibit A referred to in the Bill is as follows:

13½ *Charter of the Cumberland Telephone & Telegraph Company of Kentucky,* 1907.

14 Charter of the Cumberland Telephone & Telegraph Company of Kentucky, 1907.

15 *Articles of Incorporation of the Cumberland Telephone and Telegraph Company.*

We, whose names are signed hereto, hereby associate ourselves together and do hereby constitute ourselves a body corporate and politic under and by virtue of Chapter Fifty-six (56), 1561, of the General Statues of the Commonwealth of Kentucky, and the Acts amendatory thereof, and for the purposes and upon the terms and conditions in these Articles, hereinafter expressed.

ARTICLE 1. The names of the corporators are we whose names are undersigned. The name of the corporation is the Cumberland Telephone & Telegraph Company. Its principal place of business is in the city and county of Henderson, State of Kentucky.

ARTICLE 2. The general nature of the business proposed to be transacted is the erecting, maintaining and operating of telephone and telegraph lines, telephone exchanges, and all such business as is usually done by telephone exchanges and district telegraph and messenger systems.

ARTICLE 3. The amount of capital stock authorized is not less than Four Hundred Thousand Dollars and may be increased to Three Million Dollars, divided into shares of One Hundred Dollars each, and is to be paid in by the subscribers upon call and twenty days' notice from the Board of Directors of said Company.

ARTICLE 4. The existence of said corporation commences on the eighth day of June, 1883, and terminates in twenty-five years from said date unless sooner dissolved by agreement of three-fifths in amount, and a majority in number of the stockholders.

ARTICLE 5. The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed 50 per cent of its capital stock actually paid in.

ARTICLE 6. The affairs of said Company are to be controlled by a

Board of nine Directors, and a President and Vice-President to be selected by said Board of Directors from their own number. The said Board of Directors shall be stockholders of the Company, and shall be elected by the stockholders. The Directors elected at the first meeting of the stockholders shall be divided into three classes, numbered consecutively of three members each, the term of office of the first class to expire on the day of the annual election of said Company; then next ensuing the second class one year thereafter, and the third class two years thereafter. At each annual meeting after such classification, the stockholders of the Company shall elect for a term of three years a number of Directors equal to the number whose term expires on the day of such election, and all other vacancies to be filled in accordance with the by-laws of the corporation. Should there from any cause be a failure to elect on said day, then they may be elected at any regular meeting thereafter, or at any meeting of the stockholders called for that purpose, and the said Board of Directors may also employ such other officers and agents as they may deem necessary.

ARTCLE 7. The private property of the corporators and stockholders of said corporation shall be exempt from the corporate debts of said Company.

Witness our hands, this eighth day of June, 1883.

E. S. BABCOCK, JR.,
PAUL J. MARRS,
MILO G. KELLOGG,
E. P. HUSTON,
E. T. BAKER,
J. COMPTON,
E. P. COPELAND,
ISAAC T. RHEA,
ENOS M. BARTON.

STATE OF INDIANA,
Vanderburgh County:

Personally appeared before me the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, E. S. Babcock, Jr., E. P. Huston, Paul J. Marrs, M. G. Kellogg and E. T. Baker, with whom I am personally acquainted, who acknowledged that they signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof I have hereto signed my name and affixed my seal of office in the city of Evansville, Ind., County and State aforesaid, this first day of June, 1883.

[SEAL.] GEO. S. CLIFFORD,
Notary Public, Vanderburgh County, Ind.

STATE OF TENNESSEE,
County of Davidson, ss:

Personally appeared before the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and

qualified, J. Compton, E. P. Copeland, and Isaac T. Rhea, with whom I am personally acquainted who acknowledged that they signed the foregoing instrument of writing for the purposes therein mentioned.

17 In testimony whereof I have hereto signed my name and affixed my seal of office in the city of Nashville, County and State aforesaid, this second day of June, 1883.

[SEAL.] H. L. CLAIBORNE,
Notary Public.

COOK COUNTY,
State of Illinois, set:

Personally appeared before me, the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, Enos M. Barton, with whom I am personally acquainted, who acknowledged that he signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof I have hereto signed my name and affixed my seal of office in the City of Chicago, in the County and State aforesaid, this the sixth (6) day of June, 1883.

[SEAL.] WM. S. GRANGER,
Notary Public.

STATE OF KENTUCKY,
Henderson County, set:

I, George W. Smith, Clerk of the Henderson County Court, do certify that the foregoing Articles of Incorporation of the Cumberland Telephone & Telegraph Company was this day lodged in my office for record, and the same with the foregoing certificates thereon endorsed is with this certificate truly recorded in my office.

Witness my hand this 8th day of June, 1883.

GEO. W. SMITH, *C. H. C. C.*,
By THOS. H. BEVERLY, *D. C.*

Filed September 1, 1883, and recorded September 3, 1883.

Amendments to Articles of Incorporation of the Cumberland Telephone and Telegraph Company.

Adopted at a Meeting of the Stockholders in Henderson, Ky., December 21, 1883.

Resolved, That the following be and they are hereby adopted as amendments of the original Articles of Incorporation of the Cumberland Telephone & Telegraph Company, and that the same be subscribed and acknowledged by the Stockholders:

18 1st. That Article Three (3) of said Articles of Incorporation be and it is hereby amended so as to read as follows:

ARTICLE (3). The amount of capital stock authorized is Two

Million Seven Hundred Thousand Dollars ($2,700,000) and may be increased to Three Millions of Dollars ($3,000,000) by the vote of the stockholders holding a majority of the stock which may have been issued. Said stock shall be divided into shares of One Hundred Dollars each, and shall be paid in by the subscribers on call of the Board of Directors and after twenty days' notice of such call. Such notice shall be sufficient, if duly mailed and directed to each stockholder at the postoffice nearest his usual place of residence. Such shares shall be transferable by endorsement, but such transfer shall not entitle the holder thereof to vote at any meeting of the stockholders unless the same shall be transferred on the books of the Company.

(2) At all meetings of the stockholders each stockholder shall be entitled to one vote for every share of stock standing in his name on the books of the Company; and such vote may be in person or by proxy, properly authorized by written or printed appointment signed by such stockholders.

ELISHA S. BABCOCK, JR.,
ENOS M. BARTON,
MILO G. KELLOGG,
ERASTUS P. HUSTON,
ELWOOD T. BAKER,
ISAAC T. RHEA,
J. COMPTON,
PAUL J. MARRS,
E. P. COPELAND.

Attest:
ANDREW HESS,
JNO. J. WARD.

STATE OF TENNESSEE,
Davidson County, ss:

Personally appeared before me, the undersigned, a Notary Public in and for said County and State, duly commissioned and qualified, on this 24th day of December, A. D. 1883, Isaac T. Rhea and J. Compton, with whom I am personally acquainted, and acknowledged that they signed the foregoing instrument for the purposes therein mentioned.

Witness my hand and Notarial Seal, this 24th day of December, 1883.

[SEAL.] H. L. CLAIBORNE,
Notary Public.

19 STATE OF INDIANA,
Vanderburgh County, set:

Personally appeared before me, the undersigned Notary Public in and for said County and State, duly commissioned and qualified, on this 21st day of December, A. D. 1883, Elisha S. Babcock, Jr., Enos M. Barton, Milo G. Kellogg, E. P. Huston, and E. T. Baker, with whom I am personally acquainted, and acknowledged that

they signed the foregoing instrument for the purposes therein mentioned.

Witness my hand and Notarial Seal, this 21st day of December, 1883.

[SEAL.] J. W. NEESEN,
Notary Public, V. C.

STATE OF LOUISIANA,
City of New Orleans:

Personally appeared before the undersigned authority, the above named Paul J. Marrs and Elijah Percy Copeland, with both of whom I am personally acquainted, and who severally acknowledged that they executed the foregoing instrument for the purposes therein contained.

In faith whereof, I have hereto set my hand and affixed my seal as a qualified Notary Public of and for the Parish of New Orleans, Louisiana, at New Orleans, in the twenty-seventh day of December, A. D. 1883.

[SEAL.] ANDREW W. HERD,
Notary Public.

STATE OF KENTUCKY,
Henderson County, set:

I, George W. Smith, Clerk of the Henderson County Court, do certify that the foregoing instrument of writing was this day lodged in my office for record, and that I have recorded it the foregoing, and this certificate, in my said office.

Witness my hand, this January 1st, 1884.

GEO. W. SMITH, *C. H. C. C.*,
By THOS. H. BEVERLY, *D. C.*

Filed for record January 25, 1884; recorded January 30, 1884.

20 *Amendment to Articles of Incorporation of the Cumberland Telephone & Telegraph Company.*

Whereas, The Cumberland Telephone & Telegraph Company having its principal place of business at Henderson, in Henderson County, State of Kentucky, U. S. A., adopted Articles of Incorporation under the general statutes of said State, dated June 8, 1883, and also subsequently adopted amendments thereof and thereto, dated December 21, 1883, said Articles original and amendatory having been executed, acknowledged and published and recorded, as required by the said laws of the said State. And whereas, the said Company, having duly organized under said Articles, has been operating and doing business thereunder and as therein provided ever since. And whereas, it was deemed to the best interest of the Company that the Board of Directors be increased from nine to twelve members, and with a view thereto and for the purpose of

increasing the same at the regular annual meeting of the stockholders of the said Company, held on the 14th day of May, 1889, in Henderson County, Kentucky. Pursuant to the by-laws of the Company and upon due notice to the stockholders of said Company thereof, the following resolution was proposed for adoption to said meeting, viz.:

Resolved, That Article 6 of the Articles of Incorporation adopted by this Company, dated June 8, 1883 (amended December 21, 1883), and under which it is now operating, be amended and changed so as to be and to read as follows, viz.:

The affairs of said Company are to be controlled by a Board of twelve Directors, and a President and a Vice-President to be selected by said Board of Directors, from their own number. The said Board of Directors shall be stockholders of the Company, and shall be elected by the stockholders. The Directors elected at the first meeting of the stockholders shall be divided into three classes, numbered consecutively of four members each, the term of office of the first class to expire on the day of the annual election of said Company; then next ensuing, the second class one year thereafter, and the third class two years thereafter. At each annual meeting after such classification, the stockholders of the Company shall elect for a term of three years a number of Directors equal to the number whose term expires on the day of such election, all other vacancies to be filled in accordance with the by-laws of the
21 corporation. Should there, from any cause, be a failure to elect on said day, then they may be elected at any regular meeting thereafter or at any meeting of the stockholders called for that purpose, and the said Board of Directors may also employ such other officers and agents as they may deem necessary.

Resolved, further, That the President and Secretary of this Company be, and they are hereby, instructed and directed for and in the name of this Company to execute, acknowledge, and perfect this amendment in due and proper form, as required in such cases, as the deed and act of this corporation, and that the same be executed and acknowledged, published and recorded by them as soon as practicable. And, whereas, said resolution was adopted and approved by a vote of Fifteen Thousand One Hundred and Twenty-nine (15,129) shares, the same being more than a majority of all the shares and votes of the stockholders of said Company, and none opposing, as appears by the recorded vote and minutes of said proceedings. Now, in accordance therewith, the said Cumberland Telephone & Telegraph Company, through W. M. Duncan, the President of the same, and Jno. Lenihan, the Secretary thereof, as such, for and on behalf of said Company and the stockholders thereof, do hereby adopt the said amendment hereinbefore set forth in said resolutions as a part of the Articles of Incorporation of the said Cumberland Telephone & Telegraph Company, to be as effective and controlling as if it were part of the original.

In witness whereof, the said W. M. Duncan, as President aforesaid, and the said Jno. Lenihan, as Secretary aforesaid, have hereto attached the name and seal of the said Cumberland Telephone &

Telegraph Company, and also their own signatures as President and Secretary executing the same.

Done at Henderson, Henderson County, Kentucky, on this, the 14th day of May, A. D. 1889.

CUMBERLAND TELEPHONE
& TELEGRAPH COMPANY,
By W. M. DUNCAN, *President, and*
By JNO. LENIHAN, *Secretary.*
W. M. DUNCAN, *President.*
JNO. LENIHAN, *Secretary.*

[SEAL.]

STATE OF KENTUCKY,
Henderson County sct:

I, G. W. Smith, Clerk of the County Court in and for the County and State aforesaid, do certify that the foregoing Amended Articles of Incorporation of the Cumberland Telephone & Telegraph Company, *was* this day produced to me in my office and acknowledged before me by W. M. Duncan, as President of said Company, and by John Lenihan, Secretary of said Company, to be their act
22 and deed, and the same *is*, with this certificate, truly recorded in my office.

Witness my hand, this 14th day of May, 1889.

GEO. W. SMITH, *C. H. C. C.*

Filed June 17th and recorded June 28, 1889.

Acceptance of Present Constitution.

At a regular meeting of the Board of Directors of the Cumberland Telephone & Telegraph Company, held at the office of the Company in the City of Henderson, State of Kentucky, on the 31st day of January, 1896, Wm. Litterer, V. E. Schwab, G. G. Hall, W. N. Johnson, M. J. Smith, A. G. Sharpe, Henry Sperry, W. W. Berry, J. E. Caldwell, who constituted a majority and quorum of the Directors of said corporation, being present, the following resolution was adopted:

Resolved, That, whereas, this corporation was created under and in pursuance of Chapter 56 of the General Statutes of the State of Kentucky, and acts amendatory thereto, and its Articles of Incorporation were properly signed, acknowledged, recorded and published on the 8th day of June, 1883; and, whereas, amended articles of incorporation were properly and legally adopted, signed, acknowledged, published and recorded, on the 21st day of December, 1883, and on the 14th day of May, 1889, by the stockholders of the Cumberland Telephone & Telegraph Company; and, whereas, said corporation has been doing business for some years past and is now doing business under said Articles of Incorporation, in the State of Kentucky, now in obedience to and in compliance with the requirements of Section 570 of the Kentucky Statutes, the Cumberland

Telephone & Telegraph Company accepts the provisions of the present Constitution of the State of Kentucky, which was adopted on the 28th day of September, 1891, and Leland Hume, the Secretary of this Company, is hereby directed and instructed to file a copy of this resolution certified under the seal of this Company, in the office of the Secretary of State of the State of Kentucky.

JAMES E. CALDWELL,
President Cumberland Telephone & Telegraph Company.

[SEAL.] LELAND HUME,
Secretary Cumberland Telephone & Telegraph Company.

Received at executive office February 3, 1896, Sec. 570, Kentucky Statutes.

23 *Articles of Incorporation of the Great Southern Telephone and Telegraph Company.*

We, whose names are signed hereto, hereby associate ourselves together and do hereby constitute ourselves a body corporate and politic under and by virtue of Chapter Fifty-six (56), 1561, of the General Statutes of the Commonwealth of Kentucky, and the Acts amendatory thereof, and for the purposes and upon the terms and conditions in these Articles hereinafter expressed:

ARTICLE 1. The names of the corporators are we whose names are undersigned. The name of the corporation is the Great Southern Telephone & Telegraph Company. Its principal place of business is in the City and County of Henderson, State of Kentucky.

ARTICLE 2. The general nature of the business proposed to be transacted is the erecting, maintaining and operating of telephone and telegraph lines, telephone exchanges, and all such business as is usually done by telephone exchanges, and district telegraph and messenger systems.

ARTICLE 3. The amount of capital stock authorized is not less than Seven Hundred Thousand Dollars, and may be increased to Ten Millions of Dollars, divided into shares of One Hundred Dollars each, and is to be paid in by the subscribers upon call and twenty days' notice from the Board of Directors of said Company.

ARTICLE 4. The existence of said corporation commences on the 8th day of June, 1883, and terminates in twenty-five years from said date unless sooner dissolved by agreement of three-fifths in amount and a majority in the number of the stockholders.

ARTICLE 5. The affairs of said Company are to be controlled by a Board of nine Directors, and a President and Vice-President to be selected by said Board of Directors from their own number. The said Board of Directors shall be stockholders of the Company, and shall be elected by the stockholders. The Directors elected at the first meeting of the stockholders shall be divided into three classes, numbered consecutively, of three members each, the term of office of the first class to expire on the day of the annual election

of said Company; then next ensuing the second class one year thereafter, and the third class two years thereafter. At each annual meeting after such classification the stockholders of the Company shall elect for a term of three years a number of Directors equal
24 to the number whose term expires on the day of such election, all other vacancies to be filled in accordance with the by-laws of the corporation. Should there from any cause be a failure to elect on said day, then they may be elected at any regular meeting thereafter, or at any meeting of the stockholders called for that purpose, and the said Board of Directors may also employ such other officers and agents as they may deem necessary.

Witness our hands, this eighth day of June, 1883.

ELISHA S. BABCOCK, JR.
PAUL J. MARRS.
MILO G. KELLOGG.
ENOS M. BARTON.

STATE OF INDIANA,
Vanderburgh County:

Personally appeared before the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, E. S. Babcock, Jr., Paul J. Marrs, and M. G. Kellogg, with whom I am personally acquainted, and acknowledged that they signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof, I hereby sign my name and affix my seal of office in the City of Evansville, State and County aforesaid, this first day of June, 1883.

GEO. S. CLIFFORD,
[SEAL.] *Notary Public, Vanderburgh County, Ind.*

STATE OF ILLINOIS,
Cook County:

Personally appeared before the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, Enos M. Barton, with whom I am personally acquainted, who acknowledged that he signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof, I hereto sign my name and affix the seal of office in the City of Chicago, State and County aforesaid, this 2d day of June, 1883.

WM. G. GRANGER,
[SEAL.] *Notary Public.*

STATE OF KENTUCKY,
Henderson County, sct.:

I, George W. Smith, Clerk of the Henderson County Court, do certify that the foregoing Articles of Incorporation of the
25 Great Southern Telephone & Telegraph Company *was* this

day lodged in my office for record, and the same, with this and the foregoing certificates, *is* truly recorded in my said office.

Witness my hand, this 8th day of June, 1883.

GEO. W. SMITH, *C. H. C. C.*,
By THOS. H. BEVERLY, *D. C.*

Filed for record July 2, and recorded July 5, 1883.

Amendments to Articles of Incorporation of the Great Southern Telephone & Telegraph Company.

Adopted at a Meeting of the Stockholders of said Company in the City of Henderson, Ky., on the 21st day of December, 1883.

(1) Resolved, That the following be and they are hereby adopted as Amendments of the Original Articles of Incorporation of the Great Southern Telephone & Telegraph Company, and that the same be subscribed and acknowledged by the stockholders:

(1) That Article Three (3) of the said Articles of Incorporation be, and it is hereby, amended so as to read as follows:

ARTICLE THREE. The amount of capital stock authorized is Two Millions of Dollars, and may be increased to Ten Millions of Dollars by the vote of the stockholders holding a majority of the stock which may have been issued. The said stock shall be divided into shares of One Hundred Dollars each, and shall be paid in by the subscribers upon call of the Board of Directors, and after twenty days' notice of such call. Such notice shall be sufficient if duly mailed and directed to each stockholder at the postoffice nearest his usual place of residence. Such shares shall be transferable by endorsement, but such transfer shall not entitle the holder thereof to vote at any meeting of the stockholders unless the same shall be transferred on the books of the Company.

(2) At all meetings of the stockholders, each stockholder shall be entitled to one vote for every share of stock standing in his name on the books of the Company, and such vote may
26 be in person or by proxy, properly authorized by written or printed appointment, signed by such stockholder.

SAM'L BAYARD,
ROBERT K. DUNKERSON,
ELISHA S. BABCOCK, JR.,
MILO G. KELLOGG,
ERASTUS PERRY HUSTON,
ENOS M. BARTON,
PAUL J. MARRS,
EDWARD T. BAKER,
WILLIAM D. BABCOCK.

1883, December 21st, acknowledged by Sam'l Bayard, Robert K. Dunkerson, Elisha S. Babcock, Jr., Milo G. Kellogg, Erastus Perry

Huston, Enos M. Barton, Paul J. Marrs, and Elwood P. Baker, to be their act and deed.

Attest:

GEO. W. SMITH, *C. H. C. C.*,
By THOS. C. BEVERLY, *D. C.*

STATE OF NEW YORK,
City and County of New York:

On this twenty-ninth day of December, one thousand eight hundred and eighty-three, before me, a Notary Public in and for said City and County, personally came William D. Babcock, to me known, and known to me to be one of the persons who signed the foregoing resolution, and he duly acknowledged that he subscribed the same for the purposes therein expressed.

Witness my hand the day and year last above mentioned.

M. H. DILLENBECK,
[SEAL.] *Notary Public, City and County New York.*

STATE OF KENTUCKY,
Henderson County, sct.:

I, George W. Smith, Clerk of the Henderson County Court, do certify that the foregoing instrument of writing was produced to me in my county on December 21, 1883, and acknowledged by Samuel Bayard, Robert K. Dunkerson, Elisha S. Babcock, Jr., Milo G. Kellogg, Erastus Perry Huston, Enos M. Barton, Paul J. Marrs, and Edward T. Baker, to be their act and deed, and the same is with this and *for* the foregoing certificate truly recorded in my office.

Witness my hand, this 7th day of January, 1884.

GEO. W. SMITH, *C. H. C. C.*,
[SEAL.] By T. H. BEVERLY, *D. C.*

Filed for record January 25, 1884; recorded January 30, 1884.

27 *Acceptance of Present Constitution.*

At a meeting of the Board of Directors of the Great Southern Telephone & Telegraph Company, held at the office of the Company in the City of Henderson, State of Kentucky, on March 4, 1897, A. W. Crandell, B. F. Knight, J. M. Brown, Geo. G. Hall, Paul J. Marrs, and J. J. Fowler, who constituted a majority and quorum of Directors, being present, the following resolution was adopted:

"That the President be authorized to take such action as may be necessary to protect the interests of this Company in its chartered rights, in the State of Kentucky."

We hereby certify that the above is a true and correct copy of the resolution adopted at a meeting of the Board of Directors held on March 4, 1897, in the City of Henderson, State of Kentucky.

A. W. CRANDELL, *President.*
[SEAL.] H. C. DOIZE, *Secretary pro tem.*

In obedience to and in compliance with the above resolution, I, A. W. Crandell, President of the Great Southern Telephone & Telegraph Company, a corporation created under and in pursuance *with* Chapter 56 of the General Statutes of the State of Kentucky, and Acts amendatory thereto, represent that said Articles of Incorporation were properly signed, acknowledged and recorded on the 8th day of June, 1883, in the office of the Clerk of the Circuit Court of the County of Henderson, in the State of Kentucky, and in obedience to and in compliance with the above resolution, I file this declaration, accepting on behalf of the Great Southern Telephone & Telegraph Company the provisions of the present Constitution of the State of Kentucky, which was adopted on the 28th day of September, 1891.

A. W. CRANDELL, *President.*

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

I, Charles T. Seniat, Notary Public duly qualified, for the Parish of Orleans, City of New Orleans, and State of Louisiana, do certify that this instrument of writing was this day produced before me by A. W. Crandell, President of the Great Southern Telephone & Telegraph Company, and by him then and there acknowledged before me to be his act and deed, and the act and deed of said corporation for the purposes therein mentioned.

[SEAL.] CHAS. T. SENIAT,
Notary Public.

New Orleans, August 16, 1897.

CHAS. FINLEY,
Secretary of State,
By G. R. H.

Filed August 18, 1897.

28 ***Articles of Consolidation of the Cumberland Telephone and Telegraph Company and the Great Southern Telephone and Telegraph Company.***

WHEREAS, The Cumberland Telephone & Telegraph Company, of Hopkinsville, Christian County, Kentucky, and the Great Southern Telephone & Telegraph Company, of Henderson, Henderson County, Kentucky, are corporations organized and chartered under and by virtue of the laws of the Commonwealth of Kentucky with power, each, to do a telephone and telegraph business, either or both, and are each now engaged in the telephone business; and,

WHEREAS, The business done by, and the lines, exchanges, toll-stations, etc., of the Cumberland Telephone & Telegraph Company are in the States of Kentucky, Tennessee, Illinois, Indiana, and the northern part of the State of Mississippi, and the business done by and the lines, exchanges, toll-stations, etc., of the Great Southern

Telephone & Telegraph Company are exclusively in Louisiana, and the southern, middle and western parts of Mississippi; and,

WHEREAS, Neither of said Companies, in Kentucky or elsewhere, own or operate competing lines, exchanges, or toll-stations or any line or structure parallel or competing with any line or structure of the other Company; and,

WHEREAS, It is deemed to be to the advantage and interest of said Companies and their stockholders that they should be consolidated, and their lines and systems connected and extended as one system; and the Directors of both Companies, or a majority of the Directors of each Company have agreed upon terms of consolidation;

Now, to effectuate the same, the said Cumberland Telephone & Telegraph Company, and the Great Southern Telephone & Telegraph Company, do hereby agree upon, enter into, and make and form these Articles of Incorporation or Consolidation, namely:

First. The said two corporations do now hereby consolidate and become one corporation under, and by the name of "Cumberland Telephone & Telegraph Company," and,

Second. The principal office or place of business of this corporation shall be at Hopkinsville, Christian County, State of Kentucky, United States of America; and,

Third. The business of this Company shall be the same as that of the consolidating Companies, parties hereto, namely, to
29 conduct the telephone and telegraph business, either or both, and with power to own, acquire, and operate all lines, exchanges, toll-stations, and offices and other property necessary or proper for the efficient conduct of its said business; and,

Fourth. The capital stock of this Company shall be Three Million Dollars in the aggregate, divided into thirty thousand shares (30,000) of One Hundred Dollars ($100) each; and,

Fifth. The stockholders of the two consolidating Companies shall be the stockholders of this Company, and their respective interests and holdings shall be as follows: For each and every share (now one hundred dollars each) of and in the Cumberland Telephone & Telegraph Company, now issued and outstanding, and which aggregate 16,957 shares, or $1,695,700, the owners and holders thereof shall be entitled to, and shall receive, one share of and in the capital stock of this Company, and in the aggregate 16,957 shares, amounting to $1,695,700; and for every two shares (which shares are now one hundred dollars ($100) each) of and in the Great Southern Telephone & Telegraph Company, now issued and outstanding, and which aggregate 18,917 shares, amounting to $1,891,700, the owners, as holders thereof, shall be entitled to, and shall receive, one share of and in the capital stock of this Company, or 9,458½ shares of the

stock of this consolidated Company, aggregating $945,850. Certificates in due and proper form shall be issued and delivered upon the surrender and delivery up for cancellation of the old or outstanding certificates.

Sixth. The shares to which the owners and holders of the stock of and in the Great Southern Telephone & Telegraph Company, are, or may be entitled hereunder, and the certificates issuable therefor, shall be issued and received and taken, subject to the following provisions and conditions, viz.: Lawsuits are now pending in the courts of the State of Louisiana, wherein and whereby the said Great Southern Telephone & Telegraph Company is sought to be held liable for a large amount of back taxes, alleged to be due from said Company to said State, and minor divisions thereof, parishes, municipal corporations, etc., and which litigation is pending undetermined; now, if these suits shall be determined adversely to the said Great Southern Telephone & Telegraph Company, and it shall be held liable for said taxes, or any part thereof, sought to be collected, either in said suits, or any other hereafter to be instituted, or renewals thereof, in the event any of the present suits fail upon some ground not going to the merits, and new suits shall be instituted upon the same demands, then, and in such event or events, the holders of said shares and certificates (9,458½) for $945,850 shall not be entitled to, neither shall any of them receive, any dividends which shall or may be declared upon the stock of this Company at, or for, any of the four quarters next in order following the determination of the liability aforesaid, but the amounts to which such shareholders would otherwise be entitled as dividends so declared, shall be and become the property of this consolidated Company, and shall be passed to its credit; but it shall pay such back-tax judgments and decrees, in consideration thereof.

After the four quarterly dividend days have passed, the payment of the succeeding dividends to the said stockholders shall be resumed, whether said four quarterly dividends so retained shall suffice to pay said decrees or judgments or not; and,

Seventh. The officers by whom the affairs of this Company shall be conducted, the times and places of their election, the duration of this Company, or its period of existence, the highest amount of indebtedness which it shall incur, and the non-liability of its stockholders for the corporate indebtedness, shall be as now provided by the Articles of Incorporation of the consolidating Companies, under the laws of the Commonwealth of Kentucky, subject to the modifications resulting from an increase of the capital stock from an aggregate of $2,700,000 of capital stock, to $3,000,000; and,

Eighth. This agreement shall not be effectual, nor the consolidation complete or valid, until it shall have been consented to in writing by the owners of at least two-thirds of the said capital stock of each of said consolidating Companies, or corporations, obtained

and given as is required by the laws of the Commonwealth of Kentucky, in case of the proposed consolidation of two or more corporations; and,

Ninth. The written consent of said stockholders, that is to say, the writings evidencing the same, shall be delivered up and over by said consolidating Companies to this consolidated Company, for preservation, and the President and Secretary of each of said consolidating Companies, shall make oath in writing, duly acknowledged, to the fact that the notice required by law to be given to the stockholders of their respective companies, was given as required by law, and that the said written evidences of consent so to be delivered up, are the genuine originals, and that at least two-thirds of their stockholders so consented; and,

Tenth. The certificates of the officer, or Notary Public taking the acknowledgment of the officers and directors of the consolidating Companies hereto, for the purposes of authentication and record, shall truly show, so far as the Presidents and Secretaries of said Companies are concerned, that they made oath that the said affidavits, or oaths in writing, provided for in the Ninth Article hereof, have been filed with, and are in the custody and possession of the President and Secretary of the Cumberland Telephone & Telegraph Company.

Eleventh. The officers, directors, and managing agents of the Cumberland Telephone & Telegraph Company shall be the officers, directors, and managing agents of and for this consolidated Company until the next regular election, according to the laws, by-laws, and charter of the said (consolidating) Cumberland Telephone & Telegraph Company, and shall, as the officers, directors, and managing agents of the said Company, conduct the business; and,

Twelfth. Upon the execution and completion hereof, this consolidated corporation shall be vested with all the property, business, credits, assets, and effects of the said consolidating or constituent corporations, without deed or transfer, and shall be bound for all their contracts and liabilities; and the rights, duties, and liabilities of this corporation and the rights and duties of its stockholders shall be as prescribed by the laws of the Commonwealth of Kentucky.

In Witness Whereof, the Cumberland Telephone & Telegraph Company has caused its name and corporate seal to be affixed by James E. Caldwell, its President, and Leland Hume, its Secretary, and these articles to be subscribed by eight (8) of its eleven directors, on this, the 4th day of March, A. D. 1898; and,

The Great Southern Telephone & Telegraph Company has caused its name and corporate seal to be affixed by A. W. Crandell, its President, and Paul J. Marrs, its Secretary, and these articles to be

subscribed by six (6) of its nine directors, on this the day and date last above written.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

(Signed) By JAMES E. CALDWELL,

President of the Cumberland Telephone & Telegraph Company.

[SEAL.] LELAND HUME,

Secretary of the Cumberland Telephone & Telegraph Company.

W. LITTERER,
E. M. BARTON,
W. W. PERRY,
A. G. SHARPE,
V. E. SHWAB,
HENRY SPERRY,
M. J. SMITH,
JAMES E. CALDWELL,

Directors of the Cumberland Telephone & Telegraph Company.

GREAT SOUTHERN TELEPHONE & TELEGRAPH COMPANY,

By A. W. CRANDALL,

President Great Southern Telephone & Telegraph Company,

[SEAL.] And by PAUL J. MARRS,

Secretary Great Southern Telephone & Telegraph Company,

And by JOHN N. BOFINGER,
A. W. CRANDALL,
FRANK B. KNIGHT,
W. H. BOFINGER,
E. M. BARTON,
PAUL J. MARRS,

Directors Great Southern Telephone & Telegraph Company.

32 STATE OF TENNESSEE,
County of Davidson, set:

I, Ed. V. Jones, Notary Public in and for State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the same Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the within instrument, or Articles of Consolidation, and they, being by me duly and severally sworn, did severally depose and say that the said James E. Caldwell was, and is, the President of said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof; and,

That they know the corporate seal of said Company, and that the seal affixed to the said instrument, and purporting to be the seal

of the Cumberland Telephone & Telegraph Company, is such seal; and,

That it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to said instrument; and

They did severally further make oath and say that the owners of 14,632 shares of the stock of said consolidating Cumberland Telephone & Telegraph Company did approve of and consent to the consolidation aforesaid of the said Cumberland Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company in writing, and that said writings or written consents are now on file with them, and in their custody and possession as President and Secretary of the Cumberland Telephone & Telegraph Company for the said Company, and that the capital stock issued and outstanding of the said consolidating Company, the Cumberland Telephone & Telegraph Company, is 16,957 shares, and no more, and that the said 14,632 shares held by consenting owners, is more than two-thirds thereof; and

They did also then further and severally make oath and say that written notice of the intention to consolidate was mailed to the address of each and every of the stockholders of said Company, as required by law, more than twenty days previous to entering therein; and that such notice was also published in the Hopkinsville New Era, a newspaper printed and circulating therein, said County
33 being the principal place of said Company's business, and that the said notice was published as aforesaid more than two weeks previous to entering into the said agreement and executing said articles of Consolidation; and they did severally make oath and say, that the affidavits required by the Ninth Article of said instrument made by affiants James E. Caldwell and Leland Hume, as President and Secretary of said Cumberland Telephone & Telegraph Company, are on file with them, and in their custody and possession, as President and Secretary aforesaid, for said Company; and

The said James E. Caldwell and the said Leland Hume also then, this day, severally acknowledged the within instrument to be the act and deed of said Cumberland Telephone & Telegraph Company, and to be their act and deed as President and Secretary of the said Company, and I do further certify that Henry Sperry, M. J. Smith, James E. Caldwell, William Litterer, E. M. Barton, W. W. Berry, A. G. Sharpe, V. E. Shwab, with each of whom I am personally acquainted, this day did also personally appear before me and make oath, and say, respectively, that they are Directors of the above named consolidating corporation, the Cumberland Telephone & Telegraph Company; that the Board of Directors now consists of twelve members, and no more, and that eight members is a majority of a full board, and that they as Directors of said Company, signed and executed the foregoing instrument or articles, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company, and to be their

act and deed as Directors of said Company, for the purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal of office, at my office in Davidson County, Tennessee, on this, the 4th day of March, 1898.

[SEAL.] ED. V. JONES,
Notary Public.

My Commission expires January 1, 1900. Notary Public for Davidson County, Tenn.

STATE OF KENTUCKY,
County of Henderson, set:

I, J. L. Kimmel, a Notary Public, in and for the State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named, A. W. Crandall, President of the Great Southern Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Paul J. Marrs, the Secretary of the same Company, with each
34 of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the within instrument, or Articles of Consolidation, and they being by me duly and severally sworn, did severally depose and say, that the said A. W. Crandall was, and is, the President of the said Great Southern Telephone & Telegraph Company, and that the said Paul J. Marrs was, and is, the Secretary thereof; and

That they know the corporate seal of said Company, and that the seal affixed to the said instrument, and purporting to be the seal of the said Great Southern Telephone & Telegraph Company, is such seal; and

That it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of said Company to said instrument; and

They did severally further make oath and say that the owners of 18,274 shares of the stock of said consolidating Great Southern Telephone & Telegraph Company did approve of, and consent to, the consolidation aforesaid of the Cumberland Telephone & Telegraph Company, and the great Southern Telephone & Telegraph Company, in writings, and that said writings or written consents, are now on file with them, and in their custody and possession as President and Secretary of the Great Southern Telephone & Telegraph Company for the said Company, and that the capital stock issued and outstanding, of the said consolidating Company, the Great Southern Telephone & Telegraph Company, is 18,917 shares, and no more, and that the said 18,274 shares held by consenting owners, is more than two-thirds thereof; and,

They did also then further and severally make oath and say, that written notice of the intention to consolidate was mailed to the

address of each and every of the stockholders of said Company, as required by law, more than twenty days previous to entering therein, and that such notice was also published in the Henderson Journal, a newspaper printed and circulated in Henderson County, said county being the principal place of said Company's business, and that the said notice was published as aforesaid, more than two weeks previous to entering into the said agreement and executing said Articles of Consolidation; and

They did severally further make oath and say, that the affidavits required by the Ninth Article of said instrument made by affiants, A. W. Crandall and Paul J. Marrs, as President and Secretary of the Great Southern Telephone & Telegraph Company, were by them delivered to and filed with, and are in the custody and possession of, said James E. Caldwell and Leland Hume, as President and Secretary of the Cumberland Telephone & Telegraph Company for such corporation; and

The said A. W. Crandall and the said P. J. Marrs also then, this day, severally acknowledged the within instrument to be the act and deed of said Great Southern Telephone & Telegraph Company and to be their act and deed as President and Secretary of the said Company; and

I do further certify that A. W. Crandall, F. B. Knight, Jno. N. Bofinger, W. H. Bofinger, E. M. Barton, and P. J. Marrs, with each of whom I am personally acquainted, this day also did personally appear before me, and make oath and say, respectively, that they are Directors of the above named consolidating corporation, the Great Southern Telephone & Telegraph Company; that the Board of Directors now consists of nine members, and no more, and that six is a majority of a full Board, and that they, as Directors of said Company, signed and executed the foregoing instrument, or articles; and that they severally acknowledged the said instrument to be the act and deed of said Great Southern Telephone & Telegraph Company, and to be their act and deed as Directors of said Company for the purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal of office, at my office, in Henderson County, Kentucky, on this, the 3d day of March, 1898.

My commission expires January 29, 1900.

J. L. KIMMEL.

[SEAL.] *Notary Public for Henderson County, Ky.*

STATE OF KENTUCKY,
Christian County, set:

I, John P. Prowse, Clerk of the Christian County Court, do certify that the foregoing Articles of Consolidation, of the Cumberland Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company, were this day produced to me in my office with the foregoing certificates thereon endorsed, whereupon the same was indexed, lodged, and ordered to record, and with this and the foregoing certificates, has been duly recorded in my office, this March 11, 1898.

JNO. P. PROWSE, *Clerk.*

STATE OF KENTUCKY,
Henderson County, sct:

I, J. H. Hart, Clerk of the Henderson County Court, certify that the foregoing Articles of Consolidation, of the Cumberland Telephone & Telegraph Company, and the Great Southern Tele-
36 phone & Telegraph Company, was this day lodged in my office for record, and that I have recorded it, the foregoing, and this certificate, in my said office.

Given under my hand, this, March 16, 1898.

A copy, attest: J. H. HART,
Clerk Henderson County Court.

Filed and recorded March 29, 1898, in Book 7, Page 176.

Amended Articles of Incorporation of the Cumberland Telephone & Telegraph Company.

Statement and Amendment.

STATE OF KENTUCKY,
Christian County, sct:

Whereas, At the annual meeting of the stockholders of the Cumberland Telephone & Telegraph Company, a corporation existing and organized, under and by virtue of the laws of the State of Kentucky, which meeting was held at the Company's principal office, in Hopkinsville, Christian County, Kentucky, pursuant to due and proper notice, on Thursday, the second day of March, A. D. 1899, a resolution was then voted for, passed and consented to in writing by the owners of 25,014½ shares of the thirty thousand shares of the capital stock of said Company, and which resolution was, and is, as follows, viz.:

Resolved, That the capital stock of this Company, which is now 30,000 shares of One Hundred Dollars ($100) each, aggregating Three Millions of Dollars ($3,000,000), be increased to sixty thousand (60,000) shares, of One Hundred ($100) each, so as, after such increase, to aggregate Six Millions of Dollars ($6,000,000) in all; and, be it further

Resolved, That the Articles of Incorporation of this Company, be so amended as to provide that the amount of indebtedness to which this Company shall subject itself, shall not be limited to 50 per cent of the capital stock actually paid in, as heretofore, but may be to any amount not exceeding the authorized capital stock of the Company at the time, and to read in this respect as follows:

"The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed the author-
37 ized capital stock of the Company at the time," and be it further

Resolved, That the President of this Company, and the Directors of this Company, or a majority thereof be, and they are hereby, authorized, empowered, and directed to sign, make, execute under the seal of the Company, and acknowledge the necessary and proper Statement and Amendment, to carry out and effectuate this resolution, the same to be filed and recorded as required by law; and

Whereas, Notice in writing was given, as, and in manner and form as required by law, by the Secretary of the Company, to each and every stockholder of the said Company, more than twenty days before the day and date of said meeting, that the proposition embodied in the said resolution would be then submitted to said stockholders for their consideration and action; and

Whereas, At a meeting of the Board of Directors of this Company, duly held on the 3d day of March, A. D. 1899, thereafter, the resolution aforesaid was ratified and adopted, and the undersigned authorized and directed to sign, make, and execute, under the seal of the Company, and acknowledge the Statement and Amendment necessary to carry said resolution into effect.

Now, therefore, we, James E. Caldwell, the President of the Cumberland Telephone & Telegraph Company, and Geo. R. Knox, W. W. Berry, V. E. Shwab, M. J. Smith, A. G. Sharpe, Wm. Litterer, James E. Caldwell, Henry Sperry, being eight of the twelve Directors, constituting the Board of Directors of the said Company, do hereby state and declare that the Articles of Incorporation of the said Cumberland Telephone & Telegraph Company, under which it now exists and operates, and particularly the Fourth and Seventh Articles of the "Articles of Consolidation," entered into by the Cumberland Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company, which Articles are dated March 4, 1898, and were recorded March 11, 1898, in Book of Articles of Incorporation No. One, pages 323 to 337, inclusive, in the office of the Clerk of the County Court of Christian County, Kentucky, and which were also filed and recorded in the office of the Secretary of State of the State of Kentucky, on the 29th day of March, A. D. 1898 ,have been and are hereby amended in accordance with the said resolution, and so amended that the said Fourth Article reads, and shall read, as follows:

"The capital stock of this Company shall be Six Millions of Dollars ($6,000,000) in the aggregate, divided into sixty thousand (60,000) shares of One Hundred Dollars ($100) each." and so that the said Seventh Article of the said Articles of Consolidation
38 shall have added thereto the following amendment, and modification, viz.:

"The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed the amount of the authorized capital stock, at the time."

In Witness Whereof, we, the persons and officers aforesaid, have hereunto affixed the name of the said Cumberland Telephone & Telegraph Company, and caused its seal to be affixed by the Secre-

tary thereof, and have subscribed our names this, the 3d day of March, A. D. One Thousand Eight Hundred and Ninety-nine (A. D. 1899).

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
[SEAL.] By JAMES E. CALDWELL, *President, etc.*

Attest:
LELAND HUME, *Secretary.*

W. LITTERER,
A. G. SHARP,
HENRY SPERRY,
M. J. SMITH,
V. E. SHWAB,
W. W. BERRY,
GEO. R. KNOX,
Directors of the Cumberland Telephone & Telegraph Company.

STATE OF TENNESSEE,
Davidson County, set:

I, Ed. V. Jones, a Notary Public in and for the State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the said Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the said instrument or amendment to the Articles of Incorporation of the said Company, and they being by me duly and severally sworn, did severally depose and say that the said James E. Caldwell was, and is, the President of the said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof, and that they know the corporate seal of the said Company, and that the seal affixed to the said instrument and purport-
39 ing to be the seal of the said Cumberland Telephone & Telegraph Company is such seal, and that it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to the said instrument; and,

They did severally further make oath and say, that the owners of twenty-five thousand and fourteen and one-half shares of the stock of the said Company did vote for and consent in writing to the foregoing statement and amendment, and that the said writings, or written consents, are now on file with them, and in their custody and possession, as President and Secretary of the said Company for it,

and that the capital stock issued and outstanding of the said Company is thirty thousand (30,000) shares, and no more, and that the said 25,014½ shares held by the said consenting owners are more than two-thirds thereof; and,

They did also further and severally make oath and say that written notice of the said proposed statement and amendments was mailed to the address of each and every of the stockholders of the said Company as required by law, more than twenty days previous to the day and date on which the said meeting was held, at which it was considered and adopted, and the said James E. Caldwell and the said Leland Hume, also have this day severally acknowledged the said instrument to be the act and deed of the said Cumberland Telephone & Telegraph Company and to be their act and deed as President and Secretary of the said Company, and for the purpose therein expressed and contained; and,

I do further certify that Geo. R. Knox, W. W. Berry, M. J. Smith, V. E. Shwab, Henry Sperry, Wm. Litterer, A. G. Sharp, and James E. Caldwell, with each of whom I am personally acquainted, this day also personally appeared before me and made oath and said, respectively, that they are Directors of the above named Cumberland Telephone & Telegraph Company; that the Board of Directors now consists of twelve Directors and no more, and that eight members are a majority of a full board; and that they, the Directors of said Company, signed and executed the foregoing instrument or Amendment, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company to be their act and deed as Directors of said Company, for the purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal of office, at my office, in Davidson County, Tennessee, on this, the third day of March, A. D. 1899.

ED. V. JONES,

[SEAL.] *Notary Public for Davidson County, Tennessee.*

My *seal* of office expires on the 1st day of — 1900.

40 STATE OF KENTUCKY,
Christian County, set:

I, Jno. P. Prowse, Clerk of the Christian County Court, in the State aforesaid, do certify that the foregoing statement and Amendment of Articles of Incorporation, of the Cumberland Telephone & Telegraph Company, was this day produced to me in my county with the foregoing certificate thereon endorsed; whereupon the same was indexed, lodged, and ordered to record, and with this and the foregoing certificate, has been duly recorded in my office, this March 4, 1899.

JNO. P. PROWSE, *Clerk.*

Filed and recorded March 15, 1899, Book 8, page 245.

Amended Articles of Incorporation of the Cumberland Telephone & Telegraph Company.

Statement and Amendment.

STATE OF KENTUCKY,
Christian County, sct:

Whereas, At the annual meeting of the Stockholders of the Cumberland Telephone & Telegraph Company, a corporation existing and organized, under and by virtue of the laws of the State of Kentucky, which meeting was held at the Company's principal office in Hopkinsville, Christian County, Kentucky, pursuant to due and proper notice, on Thursday, the second day of March, A. D. 1899, a Resolution was then voted for, passed and consented to in writing by the owners of 25,014½ shares of the 30,000 shares of the capital stock of said Company, and which Resolution was, and is, as follows, viz.:

Resolved, That the capital stock of this Company, which is now 30,000 shares of $100 each, aggregating Three Millions of Dollars, be increased to sixty thousand (60,000) shares, of One Hundred Dollars ($100) each, so as after such increase, to aggregate Six Millions of Dollars in all; and, be it further

Resolved, That the Articles of Incorporation of this Company, be so amended as to provide that the amount of indebtedness to which this Company shall subject itself, shall not be limited to 50 per cent of the capital stock actually paid in, as heretofore, but may be to any amount not exceeding the authorized capital stock of the Company at the time, and to read in this respect as follows:

41 "The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed the authorized capital stock of the Company at the time;" and be it further

Resolved, That the President of this Company, and the Directors of this Company, or a majority thereof be, and they are hereby, authorized, empowered, and directed to sign, make, execute under the seal of the Company, and acknowledge the necessary and proper Statement and Amendment, to carry out and effectuate this Resolution, the same to be filed and recorded as required by law; and

Whereas, Notice in writing was given as, and in manner and from as required by law, by the Secretary of the Company, to each and every stockholder of the said Company, more than twenty days before the day and date of said meeting, that the proposition embodied in the said Resolution would be then submitted to said stockholders for their consideration and action; and

Whereas, At a meeting of the Board of Directors of this Company, duly held on the 3d day of March, A. D. 1899, thereafter, the Resolution aforesaid was ratified and adopted, and the undersigned authorized and directed to sign, make, and execute, under the seal of the Company, and acknowledge the Statement and Amendment necessary to carry said Resolution into effect.

Now, therefore, we, James E. Caldwell, the President of the Cumberland Telephone & Telegraph Company, and G. R. Knox, A. G. Sharp, W. W. Berry, Wm. Litterer, V. E. Shwab, James E. Caldwell, M. J. Smith, Henry Sperry, being eight of the twelve Directors constituting the Board of Directors of the said Company, do hereby state and declare that the Articles of Incorporation of the said Cumberland Telephone & Telegraph Company, under which it now exists and operates, and particularly the Fourth and Seventh Articles of the "Articles of Consolidation," entered into by the Cumberland Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company, which Articles are dated March 4, 1898, and were recorded March 11, 1898, in "Book of Articles of Incorporation" No. One, pages 323 to 337, inclusive, in the office of the Clerk of the County Court of Christian County, Kentucky, and which were also filed and recorded in the office of the Secretary of State of the State of Kentucky, on the 29th day of March, A. D. 1898, have been and are hereby amended in accordance with the said Resolution, and so amended that the said Fourth Article reads, and shall read, as follows:

"The capital stock of this Company shall be Six Millions of Dollars in the aggregate, divided into sixty thousand shares of One Hundred Dollars each," and

42 So that the Seventh Article of the said Articles of Consolidation shall have added thereto the following Amendment, and modifications, viz.:

"The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed the amount of the authorized capital stock, at the time."

In Witness Whereof, We, the persons and officers aforesaid have hereunto affixed the name of the said Cumberland Telephone & Telegraph Company, and caused its seal to be affixed by the Secretary thereof, and have subscribed our names this, the 3d day of March, A. D. One Thousand Eight Hundred and Ninety-nine (A. D. 1899).

CUMBERLAND TELEPHONE &
TELEGRAPH COMPANY,
By JAMES E. CALDWELL,
President, etc.

Attest:
LELAND HUME, *Secretary.*

A. G. SHARP,
W. LITTERER,
HENRY SPERRY,
M. J. SMITH,
V. E. SHWAB,
W. W. BERRY,
GEO. R. KNOX,
Directors of the Cumberland Telephone & Telegraph Company.

STATE OF TENNESSEE,
Davidson County:

I, Ed. V. Jones, a Notary Public in and for the State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the said Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the said instrument or amendment to the Articles of Incorporation of the said Company, and they being by me duly and severally sworn, did severally depose and say that the said James E. Caldwell was, and is, the President of the said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof, and that they know the corporate seal of the said Company, and that the seal affixed to the said instrument and purporting to be the seal of the said Cumberland Telephone & Telegraph Company is such seal, and that it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to the said instrument, and,

43

They did severally further make oath and say, that the owners of twenty-five thousand and fourteen and one-half shares of the stock of the said Company did vote for and consent in writing to the foregoing Statement and Amendment, and that the said writings, or written consents, are now on file with them, and in their custody and possession, as President and Secretary of the said Company for it, and that the capital stock issued and outstanding of the said Company is thirty thousand shares, and no more, and that the said 25,014½ shares held by the said consenting owners are more than two-thirds thereof; and,

They did also further and severally make oath and say that written notice of the said proposed Statement and Amendment was mailed to the address of each and every of the stockholders of the said Company, as required by law, more than twenty days previous to the day and date on which the said meeting was held, at which it was considered and adopted, and the said James E. Caldwell and the said Leland Hume, also have this day severally acknowledged the said instrument to be the act and deed of the said Cumberland Telephone & Telegraph Company and to be their act and deed as President and Secretary of the said Company, and for the purposes therein expressed and contained; and,

I do further certify that Geo. R. Knox, W. W. Berry, M. J. Smith, Henry Sperry, V. E. Shwab, Wm. Litterer, A. G. Sharp, and James E. Caldwell, with each of whom I am personally acquainted, this day also personally appeared before me and made oath and said,

respectively, that they are Directors of the above named Cumberland Telephone & Telegraph Company; that the Board of Directors now consists of twelve Directors, and no more, and that eight members are a majority of a full board; and that they, the Directors of said Company, signed and executed the foregoing instrument or Amendment, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company to be their act and deed as Directors of said Company for the purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal of office, at my office in Davidson County, Tennessee, on the third day of March, A. D. 1899.

[SEAL.] ED. V. JONES,
Notary Public for Davidson County, Tennessee.

My seal of office expires on the 1st day ——, 1900.

44 STATE OF KENTUCKY,
Christian County, set:

I, Jno. P. Prowse, Clerk of the Christian County Court, in the State aforesaid, do certify, that the foregoing statement and Amendment of the Articles of Incorporation of the Cumberland Telephone & Telegraph Company, was this day produced to me in my county with the foregoing certificate thereon endorsed; whereupon the same was indexed, lodged, and ordered to record, and with this and the foregoing certificate, has been duly recorded in my office, this March 4, 1899.

JOHN P. PROWSE, *Clerk.*

Filed and recorded March 15th, 1899, Book 8, Page 245.

An Act to Incorporate The Ohio Valley Telephone Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1st. That James B. Speed, James Clark, H. N. Gifford, William H. Johnson, J. M. Brown, William H. Newman, and A. P. Speed, their associates, successors and assigns, be, and they hereby are, made a body corporate, with the name, The Ohio Valley Telephone Company, and as such corporation may sue and be sued, enter into contracts and have and exercise all such powers and privileges as usually appertain to corporations. That the corporators named in this section shall act as directors until their successors are elected and qualified; and in the event of the failure of any of said corporators to act, their vacancies shall be filled by election by those acting.

2d. The capital stock of said Company shall be Five Hundred Thousand Dollars ($500,000), with the right to increase the same to One Million Dollars ($1,000,000), divided into shares of One Hundred Dollars ($100) each, which shall be personal property,

and evidenced by the certificates of the Company under its seal, and shall be transferable only on the books of the Company. Transfers of stock shall not be valid except as between the parties thereto until the same are regularly entered upon the books of the Company as aforesaid; and the said stock shall be paid in such manner and under such conditions as the Board of Directors may prescribe.

3d. The said corporators above named and their survivors, or a majority of them, may receive subscriptions to the capital stock of said Company, payable at such time, place, and manner as may be specified in such subscription; and said Company may organize for business when Three Hundred Thousand Dollars ($300,000) of stock shall have been subscribed.

4th. Said Company shall have the power to purchase, construct, maintain, and operate, within this State and elsewhere, telephone lines, exchanges, and systems, and to conduct all the business incident and pertaining thereto, and may purchase or acquire and dispose of real estate, machinery, apparatus, poles, wires, patents or interests therein, licenses, rights, and franchises relating to such business or to be used by said Company therefor; and said Company may manufacture or buy, sell, or lease any machinery, devices, patents, or interests therein, licenses and supplies.

5th. The said Company may construct, equip and maintain said telephone systems and exchanges, and erect poles and string wires thereon, and operate its telephone lines over, along, or under any highway, street, or alley in the City of Louisville, with and by the consent of the General Council of said city; and it may purchase or lease from any corporation created under the laws of this Commonwealth, on such terms as may be agreed upon, any telephone system or exchange, its poles, wires, apparatus, contracts, licenses, patents, or interests therein, equipments, rights of way, easements and servitudes, in highways, streets, and alleys in the City of Louisville, together with all of its properties, and when purchased or leased, shall have the power to maintain and operate the same along, over, or under the highways, streets, and alleys in the said City of Louisville; provided, however, that such telephone poles, lines, and systems have heretofore been granted the right of way or easements in the highways, streets, and alleys in the said City of Louisville by the General Council thereof. And the said Company may also construct, equip, and maintain telephone lines along, over, or under the highways, streets, and alleys, and across any water-course within this Commonwealth, so as not to obstruct the same; and said Company may connect its lines with those of any other Company, on such terms as may be agreed upon.

6th. The said Company is authorized to borrow money, and may issue and sell its negotiable coupon bonds, not exceeding one-fourth of the capital stock in existence at the time of issuing such bonds, payable at such times and places, and bearing such rate of interest, not exceeding (6) per cent per annum, payable semi-annually, as may by said Company be determined, and may secure the payments of same by mortgage or deed of trust on all the property of the

Company, real, personal, or mixed, and on any or all of its
46 patents, licenses, franchises, easements, rights of way, privileges, rents, poles, and apparatus, with such terms and conditions as may be expressed therein.

7th. The principal office of said Company shall be in Louisville, Ky., and the management and administration of the affairs of the said Company shall be by a Board of Directors of not less than three (3) nor more than nine (9), to be elected by the stockholders once in every year, as may be prescribed in the by-laws, and said Directors shall hold their offices until their successors are elected and qualified; and the Directors may elect a President, Vice-President, Secretary and Treasurer, and General Manager, and may appoint such other officers and agents as they may deem necessary, and may prescribe their duties and compensation, and require of them bond, with security thereon, for the faithful performance of their duties, and remove them and appoint others at pleasure; may fill vacancies that may occur in the Board, may make by-laws for the government of the Company, alter, amend, or abolish the same, at any meeting of said subscribers or stockholders of said Company. Each person shall be entitled to one vote for each share of stock standing in his name on the books of the said Company, and may cast his vote in person or by proxy.

8th. This Act shall take effect and be in force from its passage.

Approved April 3, 1886.

Acceptance of Present Constitution.

Be it resolved by the Board of Directors of the Ohio Valley Telephone Company, a corporation created by and organized and existing under the Act of the General Assembly of the Commonwealth of Kentucky, approved April 3, 1886, and entitled "An Act to incorporate the Ohio Valley Telephone Company," and having its principal office in Jefferson County, in said State, does hereby accept the provisions of the Constitution of the Commonwealth of Kentucky known as the Constitution of 1891, and now in force in said State; and, be it further

Resolved, That a copy of this resolution, certified by the Secretary of this Company, under the seal of the Company, be filed in the office of the Secretary of said State.

COMMONWEALTH OF KENTUCKY,
County of Jefferson:

I, J. C. Symmes, Secretary of the Ohio Valley Telephone Company, do hereby certify that the foregoing resolution is a true and perfect copy of the resolution unanimously adopted by the Board
47 of Directors of the Ohio Valley Telephone Company, at a meeting duly and regularly held by the said Board, on the 22d day of January, 1900, as the same appears of said date on page 15 of the record book kept by said Company, and now in my custody as its Secretary.

In Witness Whereof, I have subscribed my name as Secretary, and caused the seal of said Company to be attached.

This, the 22d day of January, 1900.

J. C. SYMMES,
Secretary of the Ohio Valley Telephone Company.

[SEAL.]
CALEB POWERS,
Secretary of State,
By H.

Filed January 24, 1900.

Articles of Consolidation of the Cumberland Telephone & Telegraph Company and the Ohio Valley Telephone Company.

Articles of Consolidation.

Whereas, The Cumberland Telephone & Telegraph Company, of Hopkinsville, Christian County, Kentucky, a corporation with a capital stock fixed at Six Millions of Dollars, and the Ohio Valley Telephone Company, of Jefferson County, State of Kentucky, a corporation with a capital stock fixed at One Million Dollars, are corporations organized and chartered under, and by virtue of, the laws of the Commonwealth of Kentucky, each with power to do a telephone and telegraph business, either or both, and are each now engaged in said business; and,

Whereas, The business done by, and the lines, exchanges, toll-stations, etc., of the Cumberland Telephone & Telegraph Company are in the States of Kentucky, Tennessee, Illinois, Indiana, Mississippi, and Louisiana; and the business done by, and the lines, exchanges, toll-stations, etc., of the Ohio Valley Telephone Company, are exclusively in Kentucky and Indiana, at Louisville, New Albany, Jeffersonville, and vicinity; and,

Whereas, Neither of said Companies own or operate competing lines, exchanges, or toll-stations, or any line or structure parallel or competing with any line or structure of the other company, in Kentucky, or elsewhere; and,

Whereas, it is deemed to be to the advantage and interest of said companies, and their stockholders, that they should be consolidated, and their lines and systems connected and extended
48 so as to be one system, and the Directors of both Companies or a majority of the Directors of each, have agreed upon terms of consolidation; and,

Whereas, At regular and duly held meetings of the stockholders of each of the said consolidating Companies, the owners and holders of more than two-thirds of the capital stock of each of the said companies, respectively, approved of, and directed this consolidation, and consented thereto in writing, and directed the same to be effected.

Now, to effectuate the same, the said Cumberland Telephone &

Telegraph Company, and the Ohio Valley Telephone Company, do hereby agree upon, enter into, and make and form, these Articles of Incorporation and Consolidation, namely:

First. The said two Companies do hereby consolidate and become one corporation under and by the name of "Cumberland Telephone & Telegraph Company," and,

Second. The principal office or place of business of this consolidated corporation shall be at Hopkinsville, Christian County, State of Kentucky, United States of America; and,

Third. The business of this Company shall be the same as that of the consolidated Companies, parties hereto, namely: to conduct the telephone and telegraph business, either or both, and it shall have power to own, acquire, and operate all lines, exchanges, toll-stations, real estate, and buildings, and all other property necessary and proper for the efficient conduct of its business; and,

Fourth. The capital stock of this Company shall be Ten Million Dollars in the aggregate, divided into one hundred thousand shares of One Hundred Dollars each; and,

Fifth. The stockholders of the two consolidating Companies shall be stockholders hereof, and in this consolidated Company, to the extent of their respective interests and holdings therein, as follows:

For each and every share (now One Hundred Dollars each) of, and in, the Cumberland Telephone & Telegraph Company, now issued and outstanding, the owners and the holders thereof shall be entitled to, and shall receive, one share of, and in, the capital stock of this Company; and for each and every share (now One Hundred Dollars each) of, and in, the Ohio Valley Telephone Company, now issued and outstanding, the owners and holders thereof shall be entitled to, and shall receive, one share of, and in, the capital stock of this Company.

Certificates in due and proper form shall be issued and delivered to them upon the surrender and delivery up for cancellation of the old, or outstanding certificates now held by the said shareholders of the consolidating Companies. The remainder of the shares
49 of, and in, the said capital stock of the consolidated Companies shall be held, to be disposed of as required by law, for the use and benefit of this Company; and,

Sixth. This Company shall commence or begin to exist on the day that these Articles of Incorporation shall be filed and recorded in the office of the Secretary of the State of Kentucky, and it shall continue to exist for the period of two hundred years from and after said date; and,

Seventh. This Company may issue negotiable bonds, and secure the same by mortgages and deeds of trust, to an amount in the aggregate, outstanding at any one time, not exceeding the amount of the authorized capital stock of the Company; and may also incur indebtedness not evidenced by negotiable, trust, or mortgage bonds, to an amount not forbidden by the by-laws of the Company; but the private property of the stockholders shall not be subject to the payment of any obligation or indebtedness of this corporation; and,

Eighth. The officers of this corporation shall be: A President, and not more than two Vice-Presidents, a Secretary, a Treasurer and a Board of Directors, to be composed of as many members as the Company may from time to time prescribe, and such subordinate executive committees, and managers, and agents, as this Company, by its by-laws, and from time to time, provides; but the business and affairs of the Companies now consolidating shall be managed and conducted by the officers, directors, and managing agents of the Cumberland Telephone & Telegraph Company until the next regular election of said Company, when the officers, directors, and managing agents of this Company shall be elected for such terms as may be fixed by the Company.

Ninth. The written consent of the stockholders of the consolidating Companies, that is to say, the writings evidencing the same, shall all be delivered up and over by said consolidating Companies to this consolidated Company, for preservation, and the President and Secretary of each of said consolidating Companies, shall make oath in writing, duly acknowledged, to the fact that the notices and advertisements required by law to be given to the stockholders of their respective Companies, was given as required by law, and that the said written evidences of consent, so to be delivered up, are the genuine originals, and that at least two-thirds of their stockholders consented; and,

Tenth. The certificates of the officer, or Notary Public, taking the acknowledgment of the officers and directors of the consolidating Companies hereto, for the purpose of authentication and record, shall truly show, so far as the Presidents and Secretaries of said Companies are concerned, that they made oath that the said affidavits, or oaths in writing, provided for in the Ninth Article
50 hereof, have been filed, and are in the custody and possession of the President and Secretary of the Cumberland Telephone & Telegraph Company.

Eleventh. Upon the execution and completion hereof, this consolidated corporation shall be vested with all the property, business, credits, assets, and effects of the said consolidating or constituent corporations, without deed or transfer, and shall be bound for all their contracts and liabilities; and the rights, duties, and liabilities, and powers, and privileges, and franchises of this corporation, and the rights and duties of its stockholders shall be the same as those of the consolidating Companies, or as prescribed by the laws of the Commonwealth of Kentucky, in cases of consolidating corporations.

In Witness Whereof, the Cumberland Telephone & Telegraph Company has caused its name and its corporate seal to be affixed by James E. Caldwell, its President, and by Leland Hume, its Secretary, and these Articles to be subscribed by seven of its Board of eleven Directors on this, the 27th day of January, A. D. 1900; and

The Ohio Valley Telephone Company has caused its name and corporate seal to be affixed by W. W. Berry, its Vice-President, and by J. C. Symmes, its Secretary, and these Articles to be subscribed

by four of its Board of five Directors, on this, the day and date last above written.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
By JAMES E. CALDWELL,
President of the Cumberland Telephone & Telegraph Company.

And by LELAND HUME,
Secretary of the Cumberland Telephone & Telegraph Company.

And by ALONZO G. SHARP,
GEO. R. KNOX,
W. W. BERRY,
[SEAL.] V. E. SHWAB,
M. J. SMITH,
W. LITTERER,
JAMES E. CALDWELL,
Directors of the Cumberland Telephone & Telegraph Company.

THE OHIO VALLEY TELEPHONE COMPANY,
By W. W. BERRY,
Vice-President of the Ohio Valley Telephone Company.

And by J. C. SYMMES,
Secretary of the Ohio Valley Telephone Company.
And by W. W. BERRY,
JAMES E. CALDWELL,
[SEAL.] V. E. SHWAB,
W. LITTERER,
Directors of the Ohio Valley Telephone Company.

51 STATE OF TENNESSEE,
County of Davidson:

I, Ed. V. Jones, a Notary Public in and for the county and State aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation, created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the same Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the within instrument, or Articles of Consolidation, and they, being by me duly and severally sworn, did severally depose and say that the said James E. Caldwell was, and is, the President of said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof; and,

That they know the corporate seal of said Company, and that the seal affixed to the said instrument, and purporting to be the seal of the said Cumberland Telephone & Telegraph Company, is such seal; and

That it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to said instrument; and,

They did severally further make oath and say, that the owners of 31,103½ shares of the stock of the said consolidating Cumberland Telephone & Telegraph Company did approve of, and consent, to the consolidation aforesaid, of the said Cumberland Telephone & Telegraph Company and the Ohio Valley Telephone Company, in writing, and that said writings, or written consents, are now on file with them, and in their custody and possession, as President and Secretary of the Cumberland Telephone & Telegraph Company, then for the said Company, and that the capital stock issued and outstanding of the said consolidating Company, the Cumberland Telephone & Telegraph Company, is 43,116 shares, and no more, and that the said 31,103½ shares held by consenting owners is more than two-thirds thereof; and,

They did also then further and severally make oath and say that written notice of the intention to consolidate was mailed to the address of each and every of the stockholders of the said Company, as required by law, more than twenty days previous to entering therein; and that such notice was also published in the Hopkinsville
52 New Era, a newspaper, printed and circulated in Christian County, Kentucky, said County being the principal place of said Company's business, and that the said notice was published as aforesaid more than two weeks previous to entering into the said agreement, and executing said Articles of Consolidation; and,

They did severally further make oath and say, that the affidavits required by the Ninth Article of said instrument, made by affiants, James E. Caldwell and Leland Hume, as President and Secretary of said Cumberland Telephone & Telegraph Company, are on file with them, and in their custody and possession, as President and Secretary aforesaid, for said Company; and,

The said James E. Caldwell and the said Leland Hume also then, this day, severally acknowledged the within instrument to be the act and deed of said Cumberland Telephone & Telegraph Company, and to be their act and deed as President and Secretary of the said Company; and,

I do further certify that A. G. Sharp, George R. Knox, W. W. Berry, V. E. Shwab, M. J. Smith, Wm. Litterer, and James E. Caldwell, with each of whom I am personally acquainted, this day did also personally appear before me and make oath, and say, respectively, that they are Directors of the above named consolidating corporation, the Cumberland Telephone & Telegraph Company; that the Board of Directors now consists of eleven members, and no more, and that seven members is a majority of a full Board, and that they, as Directors of said Company, signed and executed the foregoing instruments, or Articles, and they severally acknowledged

the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company, and to be their act and deed as Directors of said Company, for the purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal of office, at my office in Davidson County, Tennessee, on this, the 27th day of January, 1900.

ED. V. JONES,

[SEAL.] *Notary Public for Davidson County, Tennessee.*

My commission expires January, 1904.

STATE OF TENNESSEE,
County of Davidson:

I, Ed. V. Jones, a Notary Public in and for the County and State aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named W. W. Berry, Vice-President of the Ohio Valley Telephone Company, a corporation created and existing under and by virtue
53 of the laws of the State of Kentucky, and the within named J. C. Symmes, Secretary of the same Company, with each of whom I am personally acquainted, and who are personally known to me to be such Vice-President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me, and produced the within instrument, or Articles of Consolidation, and they, being by me duly and severally sworn, did severally depose and say, that the said W. W. Berry was, and is, the Vice-President of the Ohio Valley Telephone Company, and that the said J. C. Symmes was, and is, the Secretary thereof; and,

That they know the corporate seal of the said Company, and that the seal affixed to the said instrument, and purporting to be the seal of the said The Ohio Valley Telephone Company, is such seal; and,

That it was so affixed by order of the Board of Directors of the said Company, and that by like order, they signed the name of said Company to said instrument; and,

They did severally further make oath and say, that the owners of 5,447 shares of the stock of the said consolidating the Ohio Valley Telephone Company, did approve of, and consent to, the consolidation aforesaid, of the Cumberland Telephone & Telegraph Company and the Ohio Valley Telephone Company, in writing; and that said writings, or written consents, are now on file with them, and in their custody and possession, as Vice-President and Secretary of the Ohio Valley Telephone Company, for said Company, and that the capital stock issued and outstanding of the said consolidating Company, the Ohio Valley Telephone Company, is 5,494 shares, and no more, and that the said 5,447 shares, held by consenting owners, is more than two-thirds thereof; and,

They did also ther further and severally make oath and say, that written notice of the intention to consolidate was mailed to the address of each and every of the stockholders of said Company, as

required by law, more than twenty days previous to entering therein, and that such notice was also published in the New Era, a newspaper printed and circulating in Jefferson County, Kentucky, said County being the principal place of said Company's business, and that the said notice was published, as aforesaid, more than two weeks previous to entering into the agreement, and executing said Articles of Consolidation; and,

They did further severally make oath and say, that the affidavits required by the Ninth Article of said instrument, made by affiants, W. W. Berry and F. O. Symmes, as Vice-President and Secretary of the said the Ohio Valley Telephone Company, were by them delivered to, and filed with and are in the custody and possession of James E. Caldwell and Edward Jaume, as President and Secretary of the said the Cumberland Telephone & Telegraph Company, for said Cumberland Telephone & Telegraph Company, for said purpose; and

They did further severally make oath and say, that the affidavits required by the Ninth Article of said instrument, made by affiants, W. W. Berry and F. O. Symmes, as Vice-President and Secretary of the said the Ohio Valley Telephone Company, were by them delivered to, and filed with, and are in the custody and possession of James E. Caldwell and Edward Jaume, as President and Secretary of the said the

I, C. B. Hill, Secretary of State, certify that the hereto attached Articles of Incorporation were this day filed with me, in my office, by said corporation, and a check for $3,000, being tax on the increase in capital stock, was this day deposited, payable to the State Treasurer.

Given under my hand, this, 24th day of March, 1900.

C. B. HILL, Secretary of State,
By HARRY G. TANDY,
Asst Secretary of State.

Amended Articles of Incorporation of the Cumberland Tele phone & Telegraph Co. of Ky.

Statement and Amendment

STATE OF KENTUCKY,
Christian County, sct.

Whereas, At a meeting of the stockholders of the Cumberland Telephone & Telegraph Co. of Ky., a corporation organized and existing under and by virtue of the laws of the Commonwealth of Kentucky, which meeting was held at the Company's principal office in Hopkinsville, Christian County, Kentucky, pursuant to due and proper notice, on Thursday, the 5th day of January, A. D. 1903, a Resolution was then voted for, moved and consented to in writing by the owners of 80,126 shares of the capital stock of said Company, and which Resolution was and is as follows, viz.:

Resolved, That the authorized capital stock of this Company, which is now One Hundred Thousand (100,000) shares of One Hundred Dollars ($100) each aggregating Ten Millions of Dollars ($10,000,000) be increased to Two Hundred Thousand (200,000) shares of One Hundred Dollars ($100) each, so as after such increase to aggregate Twenty Millions of Dollars ($20,000,000) in all; and be it further

Resolved, That the President of this Company and the Directors of this Company, or a majority thereof, be, and they are hereby authorized, empowered and directed to make, sign, execute under the seal of this Company, and acknowledge the necessary and proper Statement and Amendment to carry out and effectuate this Resolution, the same to be filed and recorded as required by law; and,

Whereas, Notice in writing was given as and in manner and form as required by law, by the Secretary of the Company, by written notice mailed to each and every stockholder twenty days before the day and date of said meeting that the proposition in the said Resolution would be then submitted to the said stockholders for their consideration and action; and

Whereas, At a meeting of the Board of Directors of the Cumberland Telephone & Telegraph Co. of Ky., held on the 30th day of January, A. D. 1903, thereafter, the Resolution aforesaid

was ratified and adopted, and the undersigned authorized and directed to sign, make, execute under the seal of the Company,
56 and acknowledge the Statement and Amendment necessary to carry said Resolution into effect.

Now, therefore, we, James E. Caldwell, the President of the Cumberland Telephone & Telegraph Company, and James E. Caldwell, W. W. Berry, Wm. Litterer, M. J. Smith, F. G. Watts, V. E. Shwab, A. G. Sharp, W. R. Cole, Geo. R. Knox, being nine of the twelve Directors constituting the Board of Directors of the said Company, do hereby state and declare that the Articles of Incorporation of the said Cumberland Telephone & Telegraph Company [illegible]

"The capital stock of the Company shall be Twenty Millions of Dollars ($20,000,000) in the aggregate, divided into Two Hundred Thousand (200,000) shares of One Hundred Dollars ($100) each."

In Witness Whereof, We, the persons and officers aforesaid, have hereunto affixed the name of the said Cumberland Telephone & Telegraph Company, and caused its seal to be affixed by the Secretary thereof, and have subscribed our names, this the 9th day of January, A. D. 1903.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

[SEAL.] By JAMES E. CALDWELL, *President.*

Attest:

LELAND HUME, *Secretary.*

W. W. BERRY,
WM. LITTERER,
M. J. SMITH,
F. G. WATTS,
V. E. SHWAB,
A. G. SHARP,
W. R. COLE,
GEO. R. KNOX,
JAMES E. CALDWELL,
Directors of the Cumberland Telephone & Telegraph Company.

57 STATE OF TENNESSEE,
Davidson County:

I, J. C. Symmes, a Notary Public in and for the State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the said Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the said [illegible] and the said Leland Hume, [illegible] and [illegible] the Company, and [illegible] the Company, and [illegible] the Company,

respectively, that they are Directors of the above named Cumberland Telephone & Telegraph Company; that the Board of Directors now consists of twelve Directors, and no more, and that eight members are a majority of a full Board; and that they, the Directors of said Company, signed and executed the foregoing instrument or Amendment, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company and to be their act and deed as Directors of said Company for the purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal of office, at my office, in Davidson County, Tennessee, on the 9th day of January, A. D. 1903.

[SEAL.] J. C. SYMMES,
Notary Public for Davidson County, Tennessee.

My seal of office expires on 2d day of August, 1903.

STATE OF KENTUCKY,
Christian County, sct:

I, Jno. P. Prowse, Clerk of the Christian County Court, in the State aforesaid, do certify, that the foregoing Statement and Amendment of the Articles of Incorporation of the Cumberland Telephone & Telegraph Company, was this day produced to me in my County with the foregoing certificate thereon endorsed; whereupon the same was indexed, lodged, and ordered to record, and with this and the foregoing certificate, has been duly recorded in my office, this January 15, 1903.

JNO. P. PROWSE, *Clerk.*

Filed and certificate issued January 29, 1903.

C. B. HILL,
Secretary of State.

59 COMMONWEALTH OF KENTUCKY,
Office of Secretary of State:

I, —— ——, Secretary of State for the Commonwealth aforesaid, do hereby certify that the foregoing writing has been carefully compared by me with the original on file in this office, whereof it purports to be a copy, and that it is a true and exact copy of the same.

In Testimony Whereof, I hereunto sign my name, and have caused my official seal to be affixed.

Done at Frankfort, this — day of ——, 19—.

—— ——,
Secretary of State.

60 Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to City of Owensboro, Kentucky, Greeting:

You are hereby commanded to appear before our Circuit Court of the United States of America, for the Western District of Kentucky, Owensboro Division, at the Federal Court Hall, in the City of Owenboro, on the First Monday in March next, to answer a bill of equity exhibited against you in our said Court, by Cumberland Telephone & Telegraph Company, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable M. W. Fuller, Chief Justice of the Supreme Court of the United States of America and the seal of our said Circuit Court hereto affixed, at the Clerk's office of said Court, in Owensboro, this 27th day of January, A. D. 1909, and in the 133rd year of our Independence.

Attest:

[L. S.]

A. G. RONALD,
C. C. C., W. K. D.,
By HENRY F. CASSIN,
His Deputy Clerk.

MEMORANDUM.—The defendant is to enter its appearance in the suit in the Clerk's Office, on or before the 1st day of March next, the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

A. G. RONALD, *Clerk*,
By HENRY F. CASSIN,
Deputy Clerk.

Upon which the Marshal made the following return:

Received the within subpœna in Chancery and one copy at Owensboro, Kentucky, on 28th day of January, 1909, and Executed same at Owensboro, Ky., on 28th day of January, 1909, on the within named City of Owensboro, Kentucky by delivering a true copy of the within to W. M. O'Bryan, Mayor of said city of Owensboro, Kentucky. This 28th day of January, 1909.

Fees of Marshal $2.00.

G. W. LONG, *U. S. Marshal*,
By J. W. AMENT, *D. M.*

[Endorsed:] No. 227. Cumberland Telephone and Telegraph Company, vs. City of Owensboro, Kentucky and one Copies Spa. in Ch'y. To March Rules, 1909 at Owensboro, Kentucky. Deposit. Returned and filed Feby. 3, 1909, A. G. Ronald, Clerk by M. E. Dunn, C. C. M. Finn and Wm. L. Granberry, Fairleigh Straus & Fairleigh, Solicitors for Compl't.

61 And on the same day of said term of said court, viz., on the 27th day of January, A. D. 1909, the following order was entered, to-wit:—

This day came the complainant, the Cumberland Telephone &

Telegraph Company, by Fairleigh, Straus & Fairleigh, its counsel, and moves the Court in writing to grant it a writ of injunction against the defendant, The City of Owensboro, Kentucky, pending this suit and until the further order of this court conformable to the prayer of the bill.

Whereupon it is ordered that said motion be and it is hereby set for hearing on the 9th day of February, 1909, with leave to both complainant and defendant to file affidavits.

Whereupon complainant moves the Court to grant a restraining order against the defendant, the City of Owensboro, Kentucky, conformable to the prayer of the bill, and now upon reading the bill, it is considered that cause exists for the granting of the restraining order. Whereupon it is ordered that the defendant, the City of Owensboro, Kentucky, its officers, attorneys, agents and employés, and each of them, be and they are hereby strictly restrained and enjoined from taking any action or interfering in any manner with the right of the Cumberland Telephone & Telegraph Company to erect and maintain its poles and wires on the streets, alleys and public ways in the city of Owensboro, Kentucky, and from in any manner interfering with or disturbing its vested rights, and from in any manner interfering with or seeking to impair the obligation of any contract had by said City with the said complainant until the hearing and disposition of the motion for a preliminary injunction on the 9th day of Feby., 1909, and until the further order of this court thereon.

62 And on another day of said term of said court, viz., on the 1st day of February, A. D. 1909, the following order was entered to-wit:—

Comes the defendant, the City of Owensboro, by R. W. Slack and George W. Jolly, its counsel, and moves the Court to consolidate this action with action No. 225, Cumberland Telephone and Telegraph Company vs. City of Owensboro, Ky., now pending in this court, and that henceforth these actions proceed together; and that the hearing of the motion for an injunction pendente lite in this case be heard on February 9th, 1909, with similar motion in case 225, to which the plaintiff, Cumberland Telephone & Telegraph Co., by Fairleigh, Straus & Fairleigh, its counsel, objects.

And on another day of said term of said court, viz., on the 2nd day of February, A.D.1909, the following order was entered to-wit:—

This day came the complainant, by Fairleigh, Straus & Fairleigh, its counsel. Came also the respondent by R. W. Slack and George W. Jolly, its counsel, This cause coming on to be heard upon the complainant's motion to consolidate this action with action No. 225, Cumberland Telephone & Telegraph Company vs. City of Owensboro, now pending in this court, and that henceforth these actions proceed together, and the court being fully advised thereof, it is ordered, adjudged and decreed that said motion be and it is overruled.

63 The restraining order issued is as follows:—

In the Circuit Court of the United States, Western District of Kentucky, at Owensboro.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF OWENSBORO, KENTUCKY, Defendant.

Order.

This day came the complainant, the Cumberland Telephone & Telegraph Company, by Fairleigh, Straus and Fairleigh, its counsel, and moves the Court in writing to grant it a writ of injunction against the defendant, The City of Owensboro, Kentucky, pe-ding this suit and until the further order of this court conformable to the prayer of the bill.

Whereupon it is ordered that said motion be and it is hereby set for hearing on the 9th day of February, 1909, with leave to both complainant and defendant to file affidavits.

Whereupon complainant moves the Court to grant a restraining order against the defendant, the City of Owensboro, Kentucky, conformable to the prayer of the bill, and now upon reading the bill, it is considered that cause exists for the granting of the restraining order. Whereupon it is ordered that the defendant, the City of Owensboro, Kentucky, its officers, attorneys, agents and employés, and each of them, be and they are hereby strictly restrained and enjoined from taking any action or interfering in any manner with the right of the Cumberland Telephone & Telegraph Company to erect and maintain its poles and wires on the streets, alleys and public ways in the City of Owensboro, Kentucky, and from in any manner interfering with or disturbing its vested rights, and from in any manner interfering with or seeking to impair the obligation of any contract had by said City with the said complainant until the hearing and disposition of the motion for a preliminary injunction on the 9th day of February, 1909, and until the further order of this court thereon.

64 UNITED STATES OF AMERICA,
Western District of Kentucky, ss:

I, A. G. Ronald, Clerk of the Circuit Court of the United States, for said Western District of Kentucky, do hereby certify the above and foregoing to be a true and complete copy of the order entered in said court, on the 27th day of January, A. D. 1909, in the cause wherein Cumberland Telephone & Telegraph Co. is the Complainant, and City of Owensboro, Ky., the defendant, as the same appears from the original now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 27th day of January, A. D. 1909.

[SEAL.] A. G. RONALD, *Clerk.*

Received the within Restraining order and one copy at Owensboro, Ky., on 28th day of January, 1909, and Executed same at Owensboro, Ky., on 28th day of January, 1909, on the within named City of Owensboro, Kentucky, by delivering a true copy of the within to W. M. O'Bryan, Mayor of said City of Owensboro, Kentucky, this 28th day of January, 1909.

Fees of Marshal $2.00.

G. W. LONG,
U. S. Marshal,
By J. W. AMENT,
D. M.

65 And at another term of said court, held for its November 1909 term, continued and held, viz., on the 7th day of February, A. D. 1910, the following order was entered, to-wit:—

This day came the defendant, City of Owensboro by its counsel, Robert S. Todd, City Attorney, and George W. Jolly, and filed its demurrers to the complainant's bill of complaint herein, and also filed its Plea herein.

The demurrers above referred to are as follows:—

66 In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, Owensboro Division.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
v.
CITY OF OWENSBORO, KY., Defendant.

Demurrers.

The defendant, City of Owensboro, comes now and by protestation, not confessing or acknowledging all, or any, of the matters or things in the complainant's bill of complaint contained, to be true in such manner and form as the same are therein set forth and alleged, and on the grounds that same are irrelevant, immaterial, impertinent, redundant and multifarious, demurs to all parts of said bill relating to the ordinance passed by the Common Council of said City of Owensboro in August, 1908, entitled "An ordinance regulating the charge for telephone service in the City of Owensboro," prescribing or fixing rates and charges to be made for the rental of telephones and for telephone service, and particularly to each and all of the following parts of said bill, to-wit:

1. "That it owns and operates more than five hundred telephone exchanges, in seven different states, including an exchange in the City of Owensboro, Kentucky. Its various exchanges are connected each with the other by more than 100,000 miles of toll lines and on July 1, 1908, the number of telephones in use by the subscribers of your orator amounted to over, 160,000, and any one or more of these subscribers can with the aid of toll lines, be connected with and converse with any other of the 160,000 subscribers.

The capital expended in constructing these connections, and which are given to your orator's subscribers, amounts to more than twenty million dollars, and the facilities cannot to-day be reproduced or duplicated for that amount of money, nor within less time than ten years. The toll lines of your orator radiating from the
67 City of Owensboro, Kentucky, reach practically every point of importance and nearly every cross-road store in that section of the country, and these lines have been constructed from time to time at the request of the business interests of said City, and for the purpose of making more valuable the plant and equipment of your orator in said City."

2. "Your orator further states that the exchange at Owensboro is constructed by erecting at a central point in said city a building in which is located a switchboard, and from this board lines of small wires are carried upon poles to the business houses or residences of each subscriber and there connected with the telephone instrument. In this way each subscriber can signal the operator at the central office and receive connection with any other subscriber. For this character of services a monthly rental is paid, which entitles the subscriber to receive unlimited service from the local exchange. In the same manner, the toll lines are brought into the city, attached to the same poles, and connected to the switchboard. Any subscriber is entitled to signal the operator at the exchange and receive connection over the toll lines to other cities and places, and there be connected with any other of your orator's 160,000 subscribers. The only charge for this character of service is, generally speaking, one-half of one cent per air mile between the two cities thus connected for each three minutes conversation. This is the exact rate charged non-subscribers who use the toll lines from the central exchange; and, your orator states that its toll lines entering and leaving the City of Owensboro, Kentucky, are erected and maintained along and on the same poles which carry the wires to the local subscribers."

3. "Said exchange not only embraces service within the corporate limits of the City of Owensboro, but extends throughout a large protion of Daviess County, in which said City is located, and subscribers located inside of the corporate limits have the right to and do converse freely and for the same monthly charge all patrons connected with the exchange outside of the corporate limits
68 of said city, and likewise the subscribers outside are connected with, and converse with, the subscribers living in the corporate limits."

4. "The exchange in the beginning was to a very great extent experimental, was not regarded as of much advantage or convenience by the Citizens of said City, and the number of subscribers were few, but from time to time additional subscribers have been obtained until January 1, 1909, when the number of subscribers connected to said exchange, having the right to talk freely and at all times, day and night between themselves amounted to 1,137. From time to time as the number of subscribers increased your orator has of necessity been compelled to erect additional poles and string additional wires

to accom-odate and serve the new subscribers to accommodate and serve the new subscribers obtained, which is essential and necessary in conducting a telephone exchange, so that on July 1, 1908, and likewise at the present time, your orator has expended largely in excess of $100,000.00 in the construction of said exchange, and your orator charges that it could not be reproduced for a less amount at the present time; and that it has been built economically,, prudently and skillfully."

5. "Your" orator charges that its operations in the city of Owensboro have almost from the beginning been disasterous, so that it has not in the aggregate earned as much as one per cent upon the actual cost of its property in said city, nor has it during any one year since it has been operating said plant earned as much as five per cent net upon the actual cost or value of the plant.

During the past year, to-wit 1908, it received the following revenue:

Exchange service	$25,990.50
Proportion of tolls (earned by exchange)	1,483.25
Messenger	235.20
Miscellaneous	22.85
List ads	273.75
	$27,925.56

69 and during the same year it paid out in expenses the following:

General:

Salaries and wages	$951.39
Rent, light and heat	40.14
Traveling	164.84
Postage, Ptg. & Sta	6.80
Legal	1,050.70
Uncollectible	168.92
Incidental	213.44
	$3,704.06

Operating:

Salaries and wages	$8,238.68
Rent, light and heat	971.65
Postage, Prtg. and Sta	104.80
Directory	312.90
Advertising and canvassing	245.90
Messenger expenses	202.85
Incidental	311.84
	$10,388.67

Maintenance:

Salaries and wages	$4,995.33
Rent, light and heat	390.83
Material	943.88
Traveling	1,335.54
Incidental	790.66
Damage and compensation	60.66
	$8,516.90
Instrument rental	$1,225.83
Insurance	261.10
Taxes	1,617.16
	$24,437.89

Your orator further states that the foregoing is the exact amount of money received from the operation of said exchange and the exact amount of money paid out by it in expense in conducting said exchange; and nothing whatever is allowed therein for depreciation of its property, which your orator charges should be seven and one-half per cent upon the actual cost of the property, less whatever amount was used during the year in re-constructing
70 any part of the plant. From which it appears that your orator has a balance of $3,437.67 of revenue above the actual amount paid out by it, and if a fair amount for depreciation be added to the expenses, it will more than consume this balance of revenue, so that your orator charges, and it is a fact that your orator, on its present schedule of rates, is unable to earn any return whatever upon the actual cost of its plant in the City of Owensboro, Kentucky.

The schedule of rates in force in the City of Owensboro during 1908 ranged from $3.75 per month for a business telephone to $2.50 per month, depending entirely upon the character of equipment and service which the patron desired; and its residence rates ranged from $2.00 to $1.50 per month.

In August 1908, the Common Council of the City of Owensboro adopted aj ordinance in the following language:

"An Ordinance Regulating the Charges for Telephone Service in the City of Owensboro.

Whereas, there has been irregularity in the charges made by corporations or companies furnishing telephone service in the City of Owensboro, Ky., by which persons are often charged higher prices than others for the same service, and in the same locality, and

Whereas, such prices are often exhorbitant or unreasonable.

Now, therefore, in order to regulate the same by establishing a uniform system of reasonable charge for said service

Be it ordained by the Common Council of the City of Owensboro,

SECT. 1. That all companies, corporations, firms or individuals, who are now operating, conducting and maintaining a telephone

system in the City of Owensboro, and all companies, corporations, firms or individuals, who shall hereafter maintain, operate or conduct a telephone system or service in the City of Owensboro, shall regulate the prices or charges for such service as hereinafter provided:

71 SECT. 2. For each telephone in a business house or office, the charge or price shall not exceed two dollars and fifty cents ($2.50) per month, or at the rate of thirty ($30.00) dollars per year, for each telephone in a residence, the charge or price therefor shall not exceed one dollar and fifty ($1.50- per month, or at the rate of eighteen dollars ($18.00) per year; for extension desk telephones, the price or charge therefor shall not exceed one dollar ($1.00) per month, or at the rate of twelve dollars ($12.00) per year in addition to the regular price hereinbefore specified.

SECT. 3. It shall be unlawful for any corporation, company, firm or individual, furnishing telephones service within the City of Owensboro, to charge therefor an amount exceeding that fixed in this ordinance, and any violation thereof shall be punished by a fine of not less than ten dollars ($10.00) nor more than one hundred ($100.00); and each charge in excess of the amount so fixed shall constitute a separate offense.

SECT. 4. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECT. 5. This ordinance shall take effect from and after its passage."

This ordinance was suspended from time to time until January 1, 1909, when the same became effective; and" * * *

6. "Your orator charges that the rates adopted in said rate ordinance above set out are unreasonable, unjust, unfair and confiscatory.

Your orator further charges that if said rates should be enforced, the revenues received during the past year would be decreased more than $3,000.00 per annum, and would compel your orator to operate said exchange for the benefit and convenience of the citizens of Owensboro, Kentucky, at an actual loss, without allowing any amount whatever for depreciation."

7. "Your orator further charges that its plant has been constructed honestly, econ-ically, and skillfuly, and that its

72 value and costs *is* reasonable, proper and right. Your orator further charges that it has operated said exchange honestly, prudently, econ-ically and skillfully and that the expenses cannot be reduced and were necessary and proper to be incurred; that its receipts cannot be increased without an increase in rates, and that the rates charges by it are not only not excessive, but are not sufficient to yield to your orator a fair return upon its investment, nor are they commensurate with the value of the service rendered to your Orator's patrons in the City of Owensboro, Kentucky.

Your orator further charges that the City officials before adopting said ordinance reducing its rates, made no intelligent investigation, nor did they offer your orator any fair or reasonable opportunity

of showing the real facts in regard to the costs, or operation, or return from said exchange; and your orator further charges that the city officials did not know, nor did they undertake to investigate, or ascertain, what the real facts were with respect to the costs, the receipts or disbursements of the said exchange before adopting said ordinance, and your orator further charges that said officials did not have the information or knowledge sufficient or proper to enable them to determine what rates for telephone service in Owensboro were reasonable, proper or right."

And the defendant prays the judgment of this Honorable Court whether it shall make any answer to said parts of said bill.

ROBERT S. TODD,
City Attorney,
GEORGE W. JOLLY, *Att'ys.*

We hereby certify that the foregoing demurrers are, in our opinion, well founded in law.

ROBERT S. TODD, *City Att'y,*
GEORGE W. JOLLY.

73 WESTERN DISTRICT OF KENTUCKY,
County of Daviess, ss:

The defendant, City of Owensboro, by S. Lambert, its Mayor, says the foregoing demurrers are not interposed for delay.

S. LAMBERT.

Sworn to before me by S. Lambert, Mayor of the City of Owensboro, this the 2nd day of February, A. D. 1910.

JENNIE C. WELDON,
N. P. D. Co., Ky.

74 The plea above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, Owensboro Division.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF OWENSBORO, Defendant.

Plea.

The defendant, City of Owensboro, now and at all times, saving and reserving unto itself all benefit and advantage of exception to the many errors, uncertainties, imperfections and insufficiencies in the complainant's bill of complaint contained, for plea thereto states that heretofore, to-wit, on the 13th day of November, A. D. 1900, the complainant herein, the Cumberland Telephone & Telegraph Company, commenced a suit in equity against this defendant,

City of Owensboro (Westinghouse, Church, Kerr & Company, and U. H. Scott) in the Circuit Court of Daviess County in the State of Kentucky, and the complainant in its petition in said suit alleged that it was a corporation created, organized and existing and doing business under the laws of the State of Kentucky, and with authority to build, equip and operate telephones and telephone lines in and throughout the State of Kentucky, and with power to sue and be sued in its corporate name; [illegible] Telephone & Telegraph Company; that on the 4th day of December, 1889, the Board and Common Council of the defendant herein, City of Owensboro, by an ordinance unanimously passed, approved and signed by the Mayor of said City, granted to the complainant, under the name of the Cumberland Telephone Company, the right, privilege and franchise to erect, keep and operate on the streets, lanes and alleys of the defendant city and to maintain and operate

76 a system of telephones in and through said City, and conferring upon the complainant the right to occupy and operate lanes and alleys in said City perpetually; that the complainant accepted the said grant and thereafter proceeded to at once construct a system of telephone lines under and in virtue of said grant, in, over and across the streets of said city of Owensboro; that it erected telephone poles, strung its wires along the various streets of said city and put into operation a complete system of telephones in and throughout the city of Owensboro, and in addition thereto connected its telephone system with adjacent villages, towns and cities throughout the State of Kentucky, Tennessee, Alabama, Mississippi, Indiana, Illinois, Ohio, West Virginia, District of Columbia, Pennsylvania, New York, and generally connected its system of telephones with all the principal cities throughout the United States; that it erected, constructed and put into practical and efficient operation its telephone system, in virtue of the grant to it under the ordinance above mentioned; that among other things it was and is provided in said ordinance that "the plaintiff company, its successors and assigns, is authorized and granted the right to erect and maintain on the public streets and alleys of said City any number of telephone poles of proper size * * * and to erect and keep any number of wires thereon, with the right to connect such wires with the buildings where telephone stations are established;" that it was further provided under said ordinance of December 4, 1889, that it should only erect one line of poles on a street, that is that it should occupy one side of the public streets, except for the length of one block on the street where the exchange building was located, and where the wires of the complainant company entered such exchange building; that it was further provided in said ordinance that complainant company should have the right to erect and maintain its poles on both sides of such streets in the locality aforesaid; that among other considerations for said grant the complainant company agreed with the defendant city that it would repair

76 all streets, lanes and alleys which might be used and occupied by it if its occupancy became injurious, dangerous and unsafe; that it further agreed that as one of the considerations for said

grant that it would furnish free of charge one telephone for each engine or hose house then erected or which might thereafter be erected by the defendant city, one telephone for police headquarters, and one for the Mayor's office; that as a further consideration for said grant, between the complainant company and the defendant city, it was stipulated and agreed in said ordinance that the complainant company should allow the exclusive use of two [illegible] one [illegible] for the fire alarm telegraph, provided that the said fire alarm wires were kept [illegible] the wires of the complainant company, and that such wires should be so placed upon [illegible] that complainant should [illegible] and [illegible] at all times from the date when it began the operation of its system continuously up to, and now, furnished the defendant City with a telephone at its hose house, and for each engine house which the defendant City had established, and that it likewise furnished free a telephone for police headquarters, one for the Mayor's office, one for the mayor's residence, and one for all the various churches within the corporate limits of the defendant city; that it accepted the grant aforesaid, and had since the date of said ordinance maintained, and was then maintaining, a telephone system in and throughout the City of Owensboro and County of Daviess, and throughout the State of Kentucky, and furnishing an efficient system of telephone connection with the states and cities above mentioned; that on the faith of the grant aforesaid they expended large sums of money in the construction of its telephone system,

77 and that it had then as perfect a system of telephones as was furnished to any town or city throughout the United States; that it had expended large sums of money in the construction and in the maintenance of its said system of telephones, and that its property was valuable; that its wires were connected with and terminated at various exchanges owned by the complainant, not only in the City of Owensboro, but throughout the State; that at the exchanges the wires were arranged by means of a device for that purpose, that any one of them could be immediately connected with any other; that each wire terminated in the office, storeroom, place of business or residence of some person, firm or company, and a subscriber to the complainant company was thereby connected with every other subscriber, and that each of such subscribers could by the use of complainant's telephone in the territory where it transacted business, immediately connect with and speak to an operator in the exchange, and said operator could, and if required, did forthwith connect such subscriber's wire with that of any other subscriber named, so that the two might converse directly with each other; that to accomplish this the complainant had expended large sums of money, and its business was valuable, and it had so invested its money, established its business and conducted the same upon the faith of the privilege granted to it under said ordinance of

December 1889; that it had complied with each and every provision of said ordinance, and had more than done so; that the complainant in virtue of the ordinance aforesaid, and upon faith thereof, had built and constructed on Main Street in the City of Owensboro, between Orchard and Hathaway streets, a line of forty wires, on Southern Street, between Scotland and Fifth Streets, a line of forty wires, on Allen Street, from the corner of Seventh to Eighth streets, forty wires, on Fifth Street, between St. Ann and Breckinridge streets, twenty wires, on St. Ann Street, from Third to Sixth streets, twenty wires, from Frederica Street to the L. & N. Depot, and one hundred North Bound twenty wires, on Frederica and Sheffield Streets, which is the corner of the court house, forty wires, on Frederica street, between Third and Fourth streets, forty

78 wires, on Frederica street from Johnson's lane, and one hundred north, forty wires, on Fourth, Frederica and St. Ann, high streets, ten wires, on Fourth and Walnut, forty wires, on Fourth, between Panter and Triplett Streets, twenty wires, on Fifth and Triplett Streets eighty wires, on Seventh and Triplett seventy wires, on Triplett, between Maryland Street, Fifty wires, to the Texas Railroad and Frederica Street, six long distance wires, on Main Street and Johnson's lane, forty long distance wires; that there were some of the many lines which complainant had constructed and then had in operation, making a complete telephone system through the City of Owensboro, County of Daviess and State of Kentucky, which connected with foreign cities and states; that the city of Owensboro, was a municipal corporation created under the general laws of the State of Kentucky; that the Westinghouse, Church, Kerr & Company, was a foreign corporation, created under the laws of New York; that the defendant U. H. Scott, was its chief manager and agent in the State of Kentucky; the defendants, without right, illegally and unlawfully, in violation of the complainant's rights, were then digging holes, erecting poles, and were in the act of stringing a line or system of electric light wires along the streets of the City of Owensboro, in and among the lines of the telephone wires of the complainant; that they were proceeding without authority of law and in violation of complainant's rights to erect lines of poles in and upon the streets where the complainant had erected and then had in operation its line of telephone wires, which it had constructed under and pursuant to said grant and franchise, under the ordinance aforesaid, and that they would, unless prevented by other of said Daviess Circuit Court, erect their lines of electric light poles and string their wires thereon, to the great and irreparable damage of complainant; that the defendants were in course of erecting and constructing said electric light poles and wires, and placing them upon the same side of the street where the complainant had erected its poles and telephone wires, and they were not only doing this, but were erecting their electric light poles and stringing electric light wires among the telephone wires

79 which the complainant had theretofore constructed, and had in successful operation under the grant aforesaid; that if the defendants were permitted to erect their poles and string their elec-

tric light wires in and among the telephone wires of the complainant, it would not only result in great and irreparable loss to the complainant, but would completely destroy the efficiency of its telephone system, not only in the city of Owensboro, but throughout the County of Daviess and adjoining counties in said state, and throughout its entire system; that the wires which the defendants were stringing on said poles were in immediate proximity to the wires of the complainant, that said electric light wires charged with a powerful current of electricity and ready for operation, would be dangerous to complainant's wires; that the mutual proximity of defendant's proposed system of electric light wires and complainant's telephone wires would prevent and render impossible the proper use of complainant's telephone wires, and that it would be impossible to carry on a satisfactory local telephone business; that the construction of defendant's electric light system would be a continuing trespass upon complainant's property, and would be a continuing injury to complainant's business, that the defendants would be compelled from the electric light wires to the complainant's wires, and that it would be impossible to carry on a satisfactory local telephone business; that the construction of defendant's electric light system was unconstitutional as an invasion and infringement of complainant's rights, and were illegal and unlawful, and in violation of the ordinance under which the complainant at great cost had constructed in the City of Owensboro its plant, and in violation of the terms of the grant to it under said ordinance; that if defendants were permitted to complete the construction of their electric light system, as they were doing, its contract with defendant would be impaired, and it would be deprived of its property without due process of law, without compensation, and denied the equal protection of the law, in violation of the constitution of the State of Kentucky and of the United States; that defendants had placed poles on the same sides of the streets in line with complainant's poles, and in many places among the wires of complainant; that if defendants were permitted to build and construct their system of electric light wires, as they were then doing, and proposed to do, it would not only render the use of the complainant's wires impracticable but dangerous in the first degree; that the defendant's were erecting an electric light system for the purpose for the use of the defendant city of Owensboro, and also to furnish light to individual citizens of said
80 city, for private gain and profit, to the detriment and destruction of complainant's business; that complainant had been in the use and enjoyment of its said right and franchise for many years and long before the defendants attempted to occupy said streets with its electric light wires, and that the complainant's right to use and occupy said streets was a vested and inalienable right which could not be taken from it without due process of law, and that if defendants were permitted to complete the construction of their electric light system, or put the same in operation, as they were proceeding to do, it would be deprived of its property without due process of law, in violation of the constitution of the State of Kentucky and of the United States; that it would be denied the equal protection of the laws in violation of the constitution of the United States; that the obligation of the contract between the complainant and defendant city would be not merely impaired but absolutely violated, in violation of the constitution of the United States; that the defendants, Westinghouse, Church, Kerr & Company and C. H. Scott, were engaged in the erection and placing in

position of the electric light light wires of the defendant city, and were each of them non-residents of the State of Kentucky, and if permitted to complete the construction of the electric light system the complainant would suffer irreparable damage; and the complainant in said suit prayed for an injunction restraining the defendants and each of them from erecting their electric light wires and poles in and upon any of the streets of the City of Owensboro, upon which the complainant had erected or had in operation its system of telephone wires, and especially from erecting its electric light poles and wires in, or upon any one of said streets named in its said petition, and from erecting its electric light poles and wires on the same sides of the streets where the complainant was then maintaining its system of telephone wires, and from planting its poles in such proximity to the poles of the plaintiff as to interfere with its service, or with the service which the complainant was furnishing the public, and from entering upon the same side of the streets where the complainant was maintaining its line of telephone wires, or from in any way interfering with the complainant's lines and wires,
81 or erecting electric light wires, and from interfering with the operation of complainant's system, and for a perpetual injunction restraining the defendant from planting any of their electric light poles or stringing any wires in or among the complainant's wires, and from in any-wise interfering with the complainant's system of telephone wires, or with the successful operation thereof, and for all proper relief.

And upon the filing of said suit by complainant, in the office of the Clerk of said Daviess Circuit Court, a summons and three copies were issued thereon, directed to the sheriff of Daviess County, commandi*ng* defendants and each of them to answer within ten days the petition of the complainant, and the complainant also executed a bond and obtained a temporary restraining order from the judge of said court, and said process was placed in the hands of the sheriff of Daviess County, and the defendants and each of them were summoned to answer said petition as aforesaid.

And on the 19th day of November, 1900, the defendant, City of Owensboro, filed its separate answer in said suit wherein said defendant, among other things, denied that on the fourth day of December, 1889, or at any other time, the City of Owensboro by ordinance, or otherwise, granted to the complainant any right or privilege, or franchise, to enter upon, or over or across any of the streets or lanes or alleys of said City, or to maintain or operate a system of telephones either in or through said City, or that by such alleged ordinance any franchise or right was granted to or conferred upon the complainant to occupy any of the streets or lanes or alleys of said City perpetually, or for any time. And denied that the complainant accepted said alleged grant, or thereafter proceeded at once, or at all, to construct a system of telephone lines, or any telephone lines under, or in virtue of said grant, either in or upon, or over, or across the streets, or any of them, of the City of Owensboro, or erected any telephone poles, or strung any wires along the various streets of said city, or any street of said city, or put

into operation a complete system, or any system, of telephones in or through said city, or in addition thereto con-
82 nected its telephone system with adjacent villages or any villages or towns or cities throughout the States or Kentucky, or Tennessee, or Alabama, or Mississippi, or Indiana, or Illinois, or Ohio, or West Virginia, or the District of Columbia, or Pennsylvania, or New York, or elsewhere, or connected its system of telephone wires with all, or any, of the principal cities, or any cities, throughout the United States, or elsewhere and denied that the complainant erected or constructed or put into practical or efficient, or any, operation, its telephone system is virtue of said alleged ordinance, or otherwise (except as hereinafter alleged), or that it was provided in said alleged ordinance that the complainant, or its successors or assigns were authorized or granted the right to erect or maintain on the public streets or alleys of said city any number of telephone poles of the proper size, or any size, or to erect or keep any number of wires thereon, or the right to connect such wires with the buildings where telephone stations were established, or that it was provided in said alleged ordinance or said alleged grant of December 4, 1889, or at all, that the complainant should erect one line of poles on the street, or should occupy one side of the public streets, except where, for the length of one block, on a street the exchange building was located, or where the wires of the complainant entered such exchange building, or that it was provided in said alleged ordinance that the complainant company should have the right to erect or maintain its poles on both sides of said streets in the locality aforesaid, or that among other considerations for said grant complainant company agreed with the defendant city that it would repair all the streets or lanes or alleys, which might be used or occupied by it, if its occupancy became injurious, or dangerous or unsafe, or that it was further agreed as one of the considerations of the alleged grant, that it would furnish free of charge one telephone for each engine house, or hose house, then erected or that might be thereafter erected by the defendant city, or one telephone for police headquarters, or one for the mayor's office, or as a further consideration for said alleged grant, it was stipulated or agreed in said
83 alleged ordinance, or otherwise, that the complainant should allow the City the exclusive use of two feet on one arm on each pole, for its fire alarm system, provided said fire alarm telegraph wires were kept three feet from the wires of the complainant company, and such wires should be replaced when needed. And said defendant city further denied that the complainant having accepted said franchise, or any alleged grant, proceeded to erect an extensive, or any, complete system, or any system, of telephone wires in or throughout the City of Owensboro, or that it repaired all, or any streets occupied by it where its use in any-wise damaged the streets, or otherwise, or at all, and denied that on the faith of said alleged grant it expended large sums of money, or any money, in the construction of its telephone

system, and denied that it had knowledge or information sufficient to form or constitute a belief that the complainant had as perfect a system of telephones as was furnished to any town throughout the United States, or that it had expended large sums of money, or any money, in the construction or maintenance of its said system of telephones, or that its said wires were connected with, or terminated at, various exchanges owned by the complainant in the City of Owensboro, or throughout the State. And it denied that to accomplish this, or any object, complainant had expended large sums of money, or any money, or invested any of its money, or established its business, or any business, or conducted the same, upon the faith of the privilege granted to it under the alleged ordinance of December 4, 1889, and denied that it had complied with each and every provision of said alleged ordinance, or any of them, and denied that the complainant in virtue of said alleged ordinance, or upon the faith thereof, had built or constructed on Main Street, or any street, in the City of Owensboro, between Orchard and Hathaway streets, or elsewhere, a line of forty wires, or any wires, or on Mulberry street, or on any street, between McFarland and Fifth streets, or any street, a line of sixty wires, or any wires, or on Allen
84 street, or any street, from the corner of Seventh to — streets, or elsewhere, forty wires, or any wires, or on Fifth Street, or any street, between St. Ann and Sycamore Street, or between any streets, twenty wires, or any wires, or on St. Ann Street, or any street, from Third to Main Street, *ot* any street, eleven cables, or any cable, or fifty wires, or any wires, or on Frederica street from the L. & N. depot, or one square North thereof, or elsewhere, twenty wires, or any wires, or on Frederica street, or any street, thirty wires, or any wires, or on Frederica street, between Third and Fourth streets, or any street, forty wires, or any wires, or on Frederica street from Johnson's lane, or elsewhere, or one square North, fifty wires, or any wires, or on Fourth or Fr-derica, or St. Elizabeth Streets, or elsewhere, ten wires, or any wires, or on Fourth or Walnut streets, or any street, fifty wires, or any wires, or on Fourth between Center and Triplett Streets, or elsewhere, twenty wires, or any wires, or on Fifth and Triplett streets, or elsewhere, eighty wires, or any wires, or on Seventh and Triplett Streets, or elsewhere, seventy wires, or any wires, or on Triplett street between McFarland Street, or elsewhere, fifty wires, or any wires, or to the Texas railroad and Frederica Street, six, or any, long distance wires, or any wires, or on Main Street or Johnson's Lane, or elsewhere, forty- or any, long distance wires, or any wires, on any streets in the City of Owensboro, And defendant further denied that it or any of the defendants to that action was without right, or illegally or unlawfully, or in violation of any right of the complainant, digging holes or erecting any poles, or in any act constructing a line or system of electric wires, or any wires, along the street, or any streets, of the City of Owensboro, in or among the telephone lines of the complainant, or that they were proceeding without authority of law, or in violation of the rights of the complainant to erect lines or poles, or any

lines or poles, in or upon the streets, or any of them, where the complainant had erected, or then had in operation, its line of telephone wires, or any wires, which it had constructed under, or in pursuance of the alleged grant or franchise alleged to have
85 been ceded to it in the ordinance above referred to, or otherwise, or that the defendants would, unless immediately prevented by the order of said court, erect their lines of electric light poles or string their wires thereon to the great or irreparable damage, or any damage, of the complainant. And it denied that the defendants, or any of them, were in the course of erecting or constructing said electric light poles or wires, or placing them on the same side of the street where the complainant had erected its telephone poles or telephone wires, or that they were not only doing this, but erecting their electric light poles or stringing electric light wires in or among the telephone wires which the complainant had theretofore constructed or had in operation under the alleged grant aforesaid, or under any grant. It denied that if the defendants, or any of them, was permitted to erect said poles, or string said electric light wires in or among the telephone wires of the complainant, it would result in great or irreparable loss, or any loss, to the complainant, or would completely destroy, or destroy at all, the efficiency of its telephone system, either in the City of Owensboro, or throughout the County of Daviess, or adjoining counties in the State, or throughout its entire system, or elsewhere, or at all. It denied that the wires which the defendants were then placing in and upon the streets of the City of Owensboro were in close touch, or in fact in immediate proximity to the wires which the complainant had strung upon its poles under the alleged ordinance aforesaid. It denied that the building or construction of the electric light system as proposed by the defendant would, or did, create electric currents, or any current, upon the complainant's telephone wires, or such current or noise as would render them useless. It denied that by reason of the proximity of the defendants' poles or wires to those of the complainant, or of the powerful current used by the defendant, or together with its mode of use or manner of construction, or otherwise, currents of electricity would be transmitted to, or induced upon the wires, or any of them, of the complainant in such manner as would render them useless for telephone service, or at all. And it denied that the noise produced by the defendant's proposed system of electric light wires was loud or continuous,
86 or that the result would be, or then was, to prevent or destroy communication by telephone, or the communication of many, or any, of the complainant's subscribers with the exchange, or with each other, or that if defendant was not forthwith prohibited by order of said court it would break up or utterly destroy, or de-troy at all, the complainant's telephone system. It denied that if the defendants were permitted to erect said lines of electric light wires upon the same side of the street where the complainant's wires were strung, or in the midst of its wires, such acts would effectually destroy, or destroy at all, the efficiency of the complainant's

telephone system. It denied that the electric current which would be conducted from the defendant's lines, which would be necessary in order to enable it to operate its electric light plant, would render it impossible for complainant's subscribers to carry on any conversation, or that there would thereby be any invasion or infraction of complainant's alleged right, or that such alleged invasion or infraction was illegal or unlawful, or in violation of said alleged ordinance, or any ordinance, or in violation of the terms of said alleged grant to complainant. It denied that if defendants were permitted to complete the construction of their electric light system, or erect it, as they were alleged to be doing, among the wires or lines of the complainant, which it then had in operation, its alleged contract with the defendant, or any contract, would be impaired, or that it would be deprived of its property, or any of its property, without due process of law, or without compensation, or be denied the equal protection of the laws. It denied that the defendants had placed *its* poles on the same side of the streets, or in exact line of those of the complainant, or that defendants' wires, so far as they were strung, or would be strung if defendants were permitted to string them, were directly in or among those of the complainant in many places, or any places, or so near the wires of the complainant as to interfere with the working of the complainant's wires, or to tough them, or would render them worthless in consequence of the superior electrical current which would be sent over defendants'
87 wires as compared with that necessary to operate complainant's system, or render them worthless at all, or would result in the destruction of the complainant's lines, or that if defendants were permitted to construct their system of electric light wires, as they were then doing, and proposing to do, it would render the use of the complainant's wires impracticable or dangerous in the first degree, or any degree, to those who might attempt to use complainant's system of wires, or those who attempted to maintain or operate them, or to any person, or that the system proposed by defendant, if allowed to be perfected, would result in danger or loss of life to those who attempted to use complainant's wires or telephone system, or to any one, or that the complainant would be compelled to abandon its telephone system in Owensboro, or at any point connecting with said city, or elsewhere, or at all. It denied that the electric light system which the defendant was constructing, was being so erected that the electric light wires when strung on poles would come in close proximity to the wires of the complainant, or in among them, or in any instance touch them, or that in either case the efficiency of complainant's telephone system, or the safety of all, or any, who attempted to use or operate it, would be placed in peril, or that the complainant's alleged franchise or property would be utterly, or totally destroyed, or destroyed at all. It denied that the defendants were proposing to construct, or that they were then in process of constructing a system of electric light wires which they proposed to operate in and upon, or under, the streets of the defendant, city, in the midst of, or among the wires and poles, or

any of them, which the complainant had theretofore constructed under the alleged franchise above referred to, or at all. It denied that the defendants, or any of them were proposing to build, or were then building, or would complete and operate, unless prevented by the orders of said court, an electric light plant, in or among the wires or lines of the complainant within the corporate limits of the City of Owensboro, for the purpose of lighting the streets of the City, or for the purpose of furnishing to individual citizens of said city electric lights for their stores, or offices, or business
88 houses, or shops, or restaurants, or saloons, or residences, or for any purpose, or for the purpose of operating the machinery of private individuals, all of which, or any of them, they proposed to carry on or conduct for profit, gain, or to the detriment, or absolute destruction, or destruction at all, of the business of the complainant. It denied that the complainant was then, or had been for many years, or any time, in the use or enjoyment of any right or franchise to occupy the streets, or any of them, before the defendant attempted to occupy the streets of said city with its electric light wires, or that the complainant's right to occupy said streets was a vested or inalienable right, or any right, or that if the defendants, or any of them, were permitted to complete the construction of said electric light system, or put the same into operation as they were proposing to do the complainant would be deprived of its property, or any of it, without due process of law, or that it would be thereby, or at all, denied the equal protection of the law, or that the obligation of the alleged contract, or any contract, between the complainant and defendant city, would be thereby, or otherwise, impaired or violated. It denied that the defendants, or any of them, had no right to interfere with the complainant, or with the reasonable exercise of its franchise, or that they were then so doing, or that they would persist in so doing unless restrained by order of said court. It denied that the complainant would suffer irreparable, or any, damage by the completion or erection of said electric light system, or that its property would be thereby destroyed, or injured, or that its alleged franchise would be rendered worthless, or that irreparable, or any, injury would result to the complainant from the delay in giving notice or obtaining an injunction, or that it did not have time in which to give notice for a preliminary injunction because the defendantes were in process of constructing the said electric light system as claimed in the petition, or for any reason.

Said defendant, City of Owensboro, also for further answer to the complainant's said petition and suit, stated and alleged that on the 4th day of December, 1889, an ordinance was passed by the
89 Common Council of said City, whereby it was attempted to grant to the Cumberland Telephone Company the privileges of erecting and maintaining upon public streets and alleys of said city of Owensboro telephone poles of certain sizes and dimensions, and of keeping wires thereon, and connecting the same with buildings where telephone stations might be established, provided

the same should be so occupied as not to interfere with travel upon streets, or the substantial use thereof by the inhabitants of the city; that by the second section of said ordinance it was provided that the said company should erect only one line of poles on the street, except for the length of one block upon a street upon which the exchange building should be located, where the wires of said company entered the exchange building, and where the said company might erect and maintain its poles on both sides of said street, and the lowest wires of said company should not be less than twenty-five feet from the ground except where the wires entered the building or telephone exchange; and that it was further provided in said section that nothing in said ordinance contained should be constructed as an exclusive right to said company to erect and maintain poles upon the streets and alleys of said city, and that no obstruction should be placed by said company to the erection and maintenance of poles by any other person or company; that said company should enjoy such rights in common with other persons or companies to whom the city might see proper to extend the same right; and that by the sixth section it was provided that the ordinance might be altered or amended as the necessities of the city might demand; that said ordinance was the same that was referred to in the complainant's petition in said suit, and a certified copy hereof was filed as part thereof marked "A."

The defendant city further answered and alleged that there was not at the time of the passage of said alleged ordinance, any legislative authority, or any law in existence which authorized or empowered the Mayor and Common Council of said city, or said City, to grant to said Telephone Company, or any telephone company,

and right or privilege to erect poles or string wires, or carry
90 on the business of a telephone Company in the corporate limits of the City of Owensboro, and said defendant further answered and alleged that under and pursuant to express authority contained in the charter of said City of Owensboro, said City, on the 19th day of February, 1900, passed an ordinance providing for the erection and maintenance of an electric light plant in said city for the purpose of furnishing electric light for the use of said city for lighting the streets, alleys, and public places and its public buildings, and furnishing lights to the residents of the city of Owensboro, and that on the 25th day of July, 1900, the defendant City entered into a contract with its co-defendant, the Westinghouse, Church, Kerr & Company, whereby its said co-defendant agreed, for the consideration of $43,700, to construct, erect and install the said electric light plant and furnish all the machinery and materials, and do all the work for the same, and to complete and deliver the same to the city of Owensboro on or before the 25th day of December, 1900; that for the purpose of carrying said contract into effect said city had purchased a parcel of ground and had erected thereon a building, with smokestack and appurtenances, at a cost of $8,000, and under and pursuant to said contract said Westinghouse, Church, Kerr & Company, immediately after making the same entered upon the performance thereof and had placed in said building much val-

uable machinery, and had erected poles sufficient for the stringing of about twenty miles of wire thereon along and upon the streets of said city under the direction of the Common Council of said city for furnishing to said city arc lamps for lighting the streets, alleys and public places, and for the purpose of furnishing electric lights to such inhabitants of said city as might contract therefor, and that said contractors in the performance of said contract had expended large sums of money, and the said city had, from time to time, paid to the contractors for machinery and materials furnished, and labor performed, large sums of money, and that said contractors were then actively engaged in the performance of said contract, and had a large number of mechanics and laborers employed, and that on the 25th of July, 1900, entered into bond with the City with
91 good and sufficient security, pledging itself to execute and perform said contract, in accordance with the terms thereof, before the 25th day of December, 1900. Defendant further alleged that all said poles had been erected along the streets and alleys and public places in the city of Owensboro at points at which it was necessary to erect them in order to furnish said City with light, and that they had been erected and all the work done on them in a skillful and prudent manner, and of a height that was necessary for safety to light the city and furnish light to the inhabitants thereof, and that they could not have been erected in any other place or places along the streets or alleys so as to light said City as it should be lighted and furnish lights to the inhabitants thereof; that said poles had been so erected as that the wires were strung thereon about twenty-five or twenty-seven feet above the surface of the ground, and that it would be dangerous to life and property, and to the use of the streets to place them at a greater or less height above the surface, and that the wires were being and would be placed on said poles in a skilful, prudent and workmanlike manner, and no current was then on said wires and would not be put on them until about December 25, 1900. The defendant further pleaded that if it should be in error as to there being no lawful authority for the passage of said ordinance of December 4th, 1889, then that it pleaded and *relief* upon the authority reserved in said ordinance to the City of Owensboro to alter or amend same. The defendant further alleged that on November, 17th, 1900, the Common Council of the City of Owensboro had passed an ordinance requiring all telephone companies, telegraph companies, electric light companies, street railway companies, to place their wires not less than thirty-five feet above the *service* of the ground, and to be so strung and arranged as not to come in contact with or interfere in any manner with the wires used for the transmission of electric current, belonging to the City of Owensboro, within forty days from the passage of said ordinance, and defendant alleged that the complainant in said suit could within ten days adjust all of its wires in said city of Owensboro, at the height required by said ordinance,
92 and so as not to interfere with the wires of the electric light plant in process of construction by the Westinghouse, Church, Kerr & Company for said City, and that it was not the purpose of

the city to place current on its wires before the 20th day of December next.

This defendant further says that on the 14th day of January 1901, the complainant in said suit filed a reply to the defendant's answer, traversing the said affirmative matter hereinbefore set out.

This defendant further says that such proceedings were duly and regularly had in and before said Daviess Circuit Court in said cause as that on the 14th day of November, 1903, said cause came on before said court for final hearing, and said court, upon such final hearing made and rendered a decree and judgment therein in words and figures as follows, to-wit:

"This cause coming on to be heard on the petition, answers, replies, and on the depositions and other testimony in the cause, and the court having the record read and having heard argument orally and by brief, and having fully considered the questions of law and fact in the cause, delivered a written opinion herein, which is ordered to be filed and made part of the record and pursuant thereto the court doth now order, adjudge and decree that the plaintiff is entitled to no relief and that it take nothing by its said petition, and that the same be and the same is now dismissed, And it is further adjudged that the defendants, the City of Owensboro and the Westinghouse, Church, Kerr & Company, recover of the plaintiff, the Cumberland Telephone and Telegraph Company, their costs respectively herein incurred and may have execution therefor.

To all which judgment of the court herein the plaintiff objects and excepts and prays an appeal to the court of appeals, which is granted."

The defendant files herewith as part hereof a transcript of said petition, answer, reply, judgment and opinion marked "A."

The defendant says that said Daviess Circuit Court is and was a court of general jurisdiction; that it obtained and had in said suit, in the proceedings had therein, full jurisdiction of the complainant in this cause, and of the defendant City of Owens-
93 boro, and of the subject matter of said suit, and that it had full and complete jurisdiction to render said judgment and decree, and that said judgment has never been set aside, modified or reversed, and that the same is now and has been in full force and effect from the said date of its rendition; that said ordinance of date the 4th day of December, 1889, involved in said suit and under which the complainant claimed all the rights asserted by it therein, is the same ordinance of date the 4th day of December, 1889, which is involved in this action, and under which the complainant is asserting the rights, privileges and franchises claimed by it in its bill of complaint herein, and that it is the only ordinance or grant of any character under or by virtue of which the defendant, city of Owensboro, conferred or attempted to confer upon the complainant any license, privilege, power or authority to erect any poles or string any wires thereon, or establish any exchange or offer any telephone service in the said city, or to occupy the streets, alleys or public ways of said city for such purpose, or any purpose; and the defendant pleads said suit and the proceedings had therein, and said

judgment and decree, in bar of the complainant's alleged causes of action set up in its bill herein, and says that all matters alleged in this bill relating to the complainant's right to occupy the streets or alleys or public ways in the city of Owensboro, or to erect any poles thereon, or to string any wires thereon, or to maintain any switch board therein in said city, or to carry on a telephone business in said City under said alleged ordinance for any time whatever, has been decided adversely in said suit to the complainant's alleged claim set up in its bill herein, and it pleads said judgment in bar of the complainant's alleged right, license, privilege, easement, or authority, or any authority, in said alleged ordinance, or at all, to occupy said streets as aforesaid, or to carry on a telephone business in said city, as aforesaid, and in bar of the complainant's alleged cause of action set out in its bill of complaint herein.

CITY OF OWENSBORO, KY.,
By S. LAMBERT, *Mayor.*

94 ROBERT S. TODD,
City Attorney,
GEORGE W. JOLLY,
Attorneys for Defendant.

We hereby certify that the foregoing plea in bar is, in our opinion, well founded in law.

ROBERT S. TODD,
GEORGE W. JOLLY.

WESTERN DISTRICT OF KENTUCKY,
County of Daviess, set:

The defendant, City of Owensboro, by S. Lambert, its Mayor, says that the statements contained in the foregoing plea in bar are true as he verily believes, and are not interposed for delay.

S. LAMBERT.

Subscribed and sworn to before me this the 7th day of February, A. D. 1910.

JENNIE C. WELDON,
N. P. D. Co., Ky.

95 The exhibit A referred to in the foregoing plea and filed therein is as follows:—

Pleas in Equity Before the Honorable W. T. Owen, Judge of the Daviess Circuit Court, at the Court House, in the City of Owensboro, Kentucky, on the — Day of ——.

STATE OF KENTUCKY.

Daviess Circuit Court.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY, Plaintiff,
vs.
THE CITY OF OWENSBORO, WESTINGHOUSE, CHURCH, KERR & CO., and U. H. SCOTT, Defendants.

(§ Be it remembered that heretofore; to-wit, on the 13th day of November, 1900, the plaintiff, Cumberland Telephone and Telegraph Company, filed in the office of the Clerk of the Daviess Circuit Court, a petition in equity, which is in words and figures as follows: to-wit.)

Petition in Equity.

The plaintiff, The Cumberland Telephone and Telegraph Company, says it is a corporation, created, organized and doing business under the laws of the State of Kentucky with power and authority to build, equip and operate telephones and telephones lines, in and throughout the State of Kentucky, and with power to sue and be sued in its corporate name, Cumberland Telephone & Telegraph Company.

96 It says that on the — day of —— 1889, it applied to the Common Council of the City of Owensboro, for the right to build, maintain, and operate on all the public streets, lanes, and alleys, in and through the City of Owensboro, a system of telephones and the Mayor and Common Council of said City, having considered its application, did on the 4th day of December, 1889, by an Ordinance, unanimously passed by said body, approved and signed by the Mayor of the defendant City, granting to the plaintiff in the name of the Cumberland Telephone Co. the right, privilege and franchise to enter upon, over and across all streets, lanes, and allies of defendant City and to maintain and operate system of telephones in and through the said City, which franchise, granted to and conferred upon the plaintiff the right to occupy said streets, lanes and allies, perpetually.

The plaintiff company accepted the grant aforesaid, and thereafter proceeded at once to construct a system of telephone lines under and in virtue of said grant in, upon, over and across the streets of the City of Owensboro; it erected telephone poles, strung its wires along the various streets of the defendant city, and put into operation a complete system of telephones in and throughout the City of Owensboro and in addition thereto, it connected its telephone system with adjacent villages, towns and cities through the States of Kentucky, Tennessee, Alabama, Mississippi, Indiana, Illinois, Ohio,

West Virginia, The District of Columbia, Pennsylvania, New York, and generally it connected its system of telephones with all the principal cities throughout the United States.

It erected, constructed and put into practical and efficient operation its telephone system in virtue of the grant to it under the ordinance above mentioned.

Among other things it was and is provided in said ordinance, that,

"The Plaintiff Company, its successors and assigns is authorized and granted the right to erect and maintain on the public
97 streets and allies of said City, any number of telephone poles of proper size * * * and to erect and keep any number of wires thereon with the right to connect such wires with the buildings where telephone stations are established."

It is further provided under the ordinance and grant of December 4th, 1889, which the defendant City made to the plaintiff, that it should only erect one line of poles on a Street, that is, it should only occupy one side of the public streets, except for the length of one block on the street where the exchange building was located, and where the wires of plaintiff Company entered such exchange building.

It was further provided in said ordinance that the plaintiff Company should have the right to erect and maintain its poles on both sides of such streets in the locality aforesaid.

Among other considerations for said grant, the plaintiff Company agreed with the defendant City, that it would repair all streets, lanes and alleys, which might be used and occupied by it, if its occupancy became injurious, dangerous and unsafe.

It is further agreed as one of the Considerations for said grant, that it would furnish free of charge one telephone for each engine or hose house, then erected or which might be thereafter erected by the defendant city; one telephone for police head-quarters, and one for the mayor's office.

As a further consideration for said grant, between the plaintiff company and the defendant City, it was stipulated and agreed in said ordinance that the plaintiff Company should allow the City the exclusive use of two feet of one arm on each pole for its fire alarm telegraph, provided that the said fire alarm wires were kept three feet from the wires of plaintiff Company, and that such poles used should be replaced when needed.

Plaintiff says having accepted said franchise and grant, it proceeded to erect and extensive and complete system of telephone wires, in and throughout the City of Owensboro, it repaired
98 all streets occupied by it, where its use in any wise damages or endangered the safe use of the same.

It at once from the date when it began the operation of its system, continuously up to and now furnished the defendant City with a telephone at its hose house, and for each engine house, which the defendant City has established, it likewise furnished free a telephone for police headquarters, one for the Mayor's office, one for the

Mayor's Residence, and one for all the various churches within the corporate limits of the defendant City.

It accepted the grant aforesaid and has since the date of the ordinance aforesaid maintained and is now maintaining a telephone system in and throughout the City of Owensboro and County of Daviess, and throughout the State of Kentucky, and furnished an efficient system of telephone connection with the states and cities above mentioned.

On the faith of the grant aforesaid, it expended large sums of money in the construction of its telephone system and it has now as perfect a system of telephones as is furnished to any town or City throughout the United States.

It has expended large sums of money in the construction and in the maintenance of its said system of telephones, and its property is valuable.

It- wires are connected with and terminated at various exchanges owned by the plaintiff, not only in the City of Owensboro but throughout the State.

At the Exchanges the wires are so arranged by means of a device for that purpose, that any one of them can be immediately connected with any other. Each wire terminates in the office, store room, place of business or residence of some person, firm or Company, and a subscriber to plaintiff Company is thereby connected with every other Subscriber, and each of such subscribers can by the use of plaintiff's telephones in the territory where it transacts business immediately connect with and speak to an operator
99 in an exchange and said operator can, and if requested does, forthwith connect such subscriber's wire with that of any other subscriber named, so that the two may converse directly with each other.

To accomplish this the plaintiff has expended large sums of money and its business is valuable and it has so invested its money, established its business, and conducted the same upon the faith of the privilege granted to it under the Ordinance of December 4th, 1889.

It states that it has complied with each and every provision of the ordinance of December 4th, 1889, it has more than done so, as appears from the allegation in the petition already alleged.

The plaintiff in virtue of the ordinance aforesaid and upon the faith thereof, has built and constructed on Main Street in the City of Owensboro, between Orchard and Hathway streets a line of forty wires; on Mulberry Street, between McFarland and Fifth Street- a line of Sixty wires, on Allen Street, from the Corner of Seventh to — street, forty wires, on Fifth Street, between St. Ann and Sycamore Streets, twenty wires; on St. Ann Street from Third to Main Streets, eleven cables and *forty* wires; from Frederica Street, the L. & N. Depot, and one square north thereof, 20 wires; on Frederica Street and McFarland Streets, which is the center of its route, forty wires; on Frederica Street between Third and Fourth Streets, forty wires; on Frederica Street from Johnson's Lane and one square north, fifty wires; on Fourth, Frederica and St. Elizabeth Streets, ten wires; on Fourth and Walnut streets, fifty wires; on Fourth

Street between Center and Triplette streets twenty wires; on Fifth Street and Triplett, eighty wires; on Seventh and Triplett, seventy wires; on Seventh and triplett, 70 wires; On Triplett between Maryland Street, 50 wires; to the Texas Railroad and Frederica Street, six long Distance wires; On Main Street and Johnson's lane, forty long distance wires.

100 These are some of the many lines which plaintiff has constructed and now has in operation, making as aforesaid a complete telephone system throughout the City of Owensboro, County of Daviess, State of Kentucky, and which lines connect with foreign cities and states as above stated.

II.

Plaintiff states that the defendant, the City of Owensboro, is a municipal corporation, created under the General law of the State of Kentucky.

The defendant Westinghouse Church Kerr & Company is a foreign corporation, created under the laws of the State of New York, and the defendant U. H. Scott, is its chief manager and agent in the State of Kentucky; New York, City, in the State of New York, is the post office address of the defendant, Westinghouse Church Kerr & Company, which is a non-resident of the State of Kentucky and now absent therefrom.

The plaintiff states that the defendants without right, illegally and unlawfully and in violation of the plaintiff's right are now digging holes, erecting poles, and are in the act of stringing a line or system of electric wires, along the streets of the City of Owensboro, in and among the telephone lines of the plaintiff, they are proceeding without authority of law and in violation of the plaintiff's right to erect lines of poles in and upon the streets where the plaintiff has erected and now has in operation its line of telephone wires, which it has constructed under and pursuance to the grant and franchise ceeded to it in the ordinance above referred to, and they will, unless immediately prevented by an order of this court, erect their lines of electric light poles and string their wires thereon to the great and irreparable damage of the plaintiff.

The plaintiff says that the defendants are in the course of erecting and constructing said electric light poles, and wires and placing them upon the same side of the street where the plaintiff has erected its poles, and telephone wires. They are not only doing this, but erecting their electric light poles and stringing electric light wires in and among the telephone wires which the plaintiff has

101 heretofore constructed and has in successful operation under the grant aforesaid.

It says if the defendants are permitted to erect their poles and string their electric light wires in and among the telephone wires of the plaintiff, it will not only result in great and irreparable loss to the plaintiff, but will completely destroy the efficiency of its telephone system, not only in the City of Owensboro, throughout the County of Daviess and Adjoining counties in the State, but throughout its entire system?.

The wires which the defendants are now placing, in and upon the streets of the City of Owensboro, are in close touch, in fact in immediate proximity, to the wires which the plaintiff has strung upon its poles, under the ordinance aforesaid.

The building and construction of this electric light system as proposed by the defendants, will and does create electric currents and noise, upon the plaintiff's telephone wires, which will render them absolutely useless.

By reason of the proximity of the defendants' poles and wires, to those of the plaintiff, and of the powerful current, used by the defendants, together with its mode of use and manner of construction, currents of electricity are transmitted to and inducted upon the wires of the plaintiff in such manner as to render them useless for telephone service.

The noises produced by the defendants' proposed system of electric wires, are both loud and continuous, and the result will be and is to prevent and destroy communication by telephone, and the connection of many if not all the plaintiff's subscribers with the exchanges and with each other, and if it is not forthwith prohibited by the order of this Court, it will break up and utterly destroy the plaintiff's telephone system.

If the defendants are permitted to erect their lines of electric light wires, not only upon the same side of the streets, where the plaintiff's wires are strung but in the very midst of its wires, which it avers the defendants are doing and proposing to do at once, such acts will effectually destroy the efficiency of the plaintiff's telephone system.

102 The plaintiff says the electric current which will be conducted over the defendants' lines, and which will be necessary in order to enable it to operate its electric light plant, will render it impossible for the plaintiff's subscribers to carry on any conversation whether for business or pleasure, and it says such invasion and infraction of its rights are illegal and unlawful, in violation of the ordinance under which the plaintiff at great cost built and constructed in the city of Owensboro its plant, and in violation of the terms of the grant to it under the ordinance aforesaid. If the defendants are permitted to complete the construction of their electric light system, and erect it as they are doing among the wires, and lines of plaintiff, which it now has in operation, its contract with defendant will be impaired, it will be deprived of its property without due process of law, without compensation, and denied the equal protection of the laws which is in violation of the constitution of the state of Kentucky, and of the United States.

Defendants have placed their poles not only on the same side of the streets, but in an exact line with those of plaintiff, defendants' wires so far as they are strung and will be strung if defendants are permitted to string them, are directly in and among those of plaintiff, in many places, so near the wires of plaintiff, as not only to interfere with the working of plaintiff's wires, but to touch them, and render them worthless in consequence of the superior electric current which will be sent over defendants' wires as compared with

that necessary to the operation of plaintiff's system. The wires proposed to be used by defendants carry many times stronger electric currents than those used by plaintiff, which will result in the destruction of the plaintiff's lines.

Morever, if defendants are permitted to build and construct their system of electric light wires, as they are now doing and propose to do it will not only render the use of plaintiff's wires impracticable, but dangerous in the first degree to those who attempt to use plaintiff's system of wires, as well as to all those who
103 attempt to maintain or operate the same. The system proposed by defendants, if it is allowed to be perfected will result not merely in danger but in loss of life to those who attempt to use the plaintiff's wires and telephone system and plaintiff will be compelled to abandon its telephone system not only in the city of Owensboro, but in all points communicating with the said city. The electric light system which the defendants are now constructing are being so erected that the electric wires when strung on poles will come in close proximity to the wires of plaintiff, in many instances touching them and in both cases not merely the efficiency of plaintiff's telephone system, but the safety of all those who attempt to use or operate same will be placed in peril and the plaintiff's franchise and property will be utterly and totally destroyed.

Plaintiff further states, that defendants are proposing to construct and they are now in process of construction a system of electric light wires which they propose to operate in and upon and along the streets of the defendant city of Owensboro, in the very midst of and among the wires and poles which the plaintiff heretofore constructed under the franchise above referred to.

Defendants propose to build and are building and will complete and operate unless prevented by the orders of this court an electric light plant in and among the wires and lines of the plaintiff within the corporate limits of the City of Owensboro, for the purpose as they allege of lighting the streets of Owensboro and for the purpose of furnishing to the individual citizens of said city, electric lights in their stores, saloons, offices, business houses, shops, restaurants, and residences and for the further purpose of operating the machinery of private individuals, all of which business they propose to carry on and to conduct for private gain and profit, not only to the detriment, but to the absolute destruction of the business of the plaintiff.

104 It further says that on each and all the streets herein before named the poles erected and now being erected the wires now strung and proposed to be strung on said poles by the defendant are not merely on the same side of the streets where the plaintiff has erected its poles and strung its wires, but they are in and among the plaintiff's poles and wires, the defendant's electric wires in very many instances coming in direct contact with the plaintiff's wires, which will effectually destroy the plaintiff's telephone system not only in and upon the streets of the City of Owensboro, but will destroy its system of telephone service throughout the County of Daviess

and adjoining counties in the State of Kentucky, and its connection with the states and cities herein before mentioned.

It states that it has been in the use and enjoyment of its said right and franchise for many years and long before the defendants attempted to occupy said streets with its electric light wires, and the plaintiff's right to use and occupy the said streets is a vested and inalienable right which cannot be taken from it without due process of law, and it avers, if the defendants, are permitted to complete the construction of their electric light system, and put the same into operation, as they are now rapidly proceeding to do, that it will be deprived of its property without due process of law; which is in violation, not only of the constitution of the State of Kentucky, but of the Constitution of the United States.

It will be denied the equal protection of the law, which is also in violation of the constitution of the United States. The obligations of the contract between the plaintiff and defendant city will not merely be impaired but absolutely violated, which is in violation of the constitution of the United States.

It says that the defendants have no right to interfere with it, or with the reasonable exercise of its franchise, which they are now doing and will persist in doing unless restrained by the orders of this court.

105 The plaintiff further states, that the defendants Westinghouse, Church, Kerr & Company, and U. H. Scott are actively engaged in the erection, construction and placing in position the electric light wires herein complained of and each of them are non-residents of the State of Kentucky, and if they are permitted to complete the construction and erection of said Electric light system as aforesaid, the plaintiff will suffer irresistable damage *damage* which cannot be estimated in dollars and cents, for not merely will its property be destroyed but its franchise as herein set out will be rendered worthless.

It says that irreparable injury will result to it, from the delay in giving notice for the injunction which it prays for herein; it has not time in which to give notice for a prem*l*iminary injunction because the defendants with a full corps of hands are now in process of constructing the electric light system in the City of Owensboro, as herein before set out, and they will complete same unless immediately prohibited by the orders of this court.

No previous injunction has been asked, granted or refused by this court, or any other court or Judge, or by the Clerk of this or any other Court.

The premises considered the plaintiff prays that a temporary restraining order be granted against the defendants restraining them and each of them from erecting their electric light poles and wires in or upon any of the streets in the City of Owensboro, upon which the plaintiff has erected and now has in operation its system of telephone wires and especially from erecting its electric light poles and wires in or upon any one of the streets herein bef*f*ore named, and from erecting its electric lights and poles, on the same side of the streets where plaintiff is now maintaining its system of telephone

wires, and from planting its poles in such proximity to the poles of the plaintiff so as to interfere with the service which the plaintiff is furnishing the public, and from entering upon the same side of the streets where plaintiff is maintaining its line of telephone wires, and from in any way interfering with the plaintiff's lines
106 and wires, and from erecting any electric light wires so near to the said wires as to interfere with their efficient operation and from erecting any electric light poles so near to the plaintiff's poles as to interfere with the efficient operation of the plaintiff's system, it prays for a temporary injunction and finally for a permanent injunction restraining the defendants from planting any of their electric light poles or stringing any electric light wires in or among the lines of the plaintiff's wires and from in any wise interfering with the plaintiff's system of telephone wires or with the successful operation thereof and prays for all general relief.

SWEENEY, ELLIS & SWEENEY,
Attorneys for Plaintiff.

W. D. Burford says he is the chief manager of the plaintiff Company and its chief officer in Daviess County, and the statements in the foregoing petition are true, as he verily believes.

W. D. BURFORD.

Subscribed and sworn to before me by W. D. Burford, this the 13th day of November, 1900.

S. W. BEDFORD, *Clerk.*

(The foregoing petition is endorsed on the back as follows: Filed and Sums. and 3 copies issued this 13" day of Nov. 1900. Atty.: S. W. Bedford, Clerk. Bond executed, restraining order and 3 copies issued this 13" day of November, 1900. Att.: S. W. Bedford, Clerk." Order and 3 Copies issued and Amended order of court and 3 copies issued this November 14th, 1900. Att.: S. W. Bedford, Clerk.

107 (The Answer of City of Owensboro filed herein on the 19th day of November, 1900 is next copied and is in words and figures as follows, to-wit.)

Answer of City of Owensboro.

The defendant, The City of Owensboro, for answer to the plaintiff's petition, denies that the plaintiff is a corporation, or is created, or organized, or doing business under the laws of the State of Kentucky, or has power or authority to build or equip or operate telephones or telephone lines, in or throughout the State of Kentucky; or power to sue and be sued in its alleged corporate name, Cumberland Telephone & Telegraph Company, or any other name.

The defendant denies that on the 4th day of December, 1889, or at any other time, the City of Owensboro, by an ordinance, or

otherwise, granted to the plaintiff any right or privileges, or franchise to enter upon, or over, or across any of the streets, or lanes, or alleys of said city, or to maintain, or operate a system of telephones either in or through said city, or that by such alleged ordinance any franchise or right was granted to or conferred upon the plaintiff to occupy any of the streets, lanes or alleys of said city perpetually or for any time. The defendant denies that the plaintiff accepted said alleged grant, or thereafter proceeded, or at once, or at all, to construct a system of telephone lines, or any telephone lines under or in virtue of said grant, either in, or upon, or over, or across the streets or any of them, of the City of Owensboro, or erected any telephone poles, or strung any wires along the various streets of said city, or any streets of said city, or put into operation a complete system, or any system of telephones in or through said city, or in addition thereto connected its telephone system with adjacent villages, or any villages or towns, or cities throughout the State of Kentucky, or Tennessee, or Alabama, or Mississippi, or Indiana, or Illinois, or Ohio, or West Virginia or the Dis-
108 trict of Columbia, or Pennsylvania or New York, or elsewhere, or connected its system of telephones with all of any of the principal cities, or any cities, throughout the United States, or elsewhere. It denies that it erected or constructed, or put into practical or efficient operation or any operation, its telephone system in virtue of said alleged ordinance or otherwise, except as hereinafter alleged; or that it was provided in said alleged ordinance that the plaintiff, or its successors or assigns were authorized or granted the right to erect or maintain on the public streets or alleys of said city any number of telephone poles of the proper size, or any size; or to erect or keep any number of wires thereon, or the right to connect such wires with the buildings where telephone stations are established; or that it was provided in said alleged ordinance, or said alleged grant of December 4, 1889, or at all, that the plaintiff should erect one line of poles on a street, or should occupy one side of the public streets except where, for the length of one block on a street, the exchange building was located, or where the wires of the plaintiff entered such exchange building; or that it was provided in said alleged ordinance that the plaintiff company should have the right to erect or maintain its poles on both sides of said streets in the locality aforesaid; or that among other considerations for said grant plaintiff company agreed with the defendant city that it would repair all the streets, or lanes, or alleys which might be used or occupied by it if its occupancy became injurious, or dangerous, or unsafe; or that it was further agreed as one of the considerations of the alleged grant that it would furnish free of change one tel-phone for each engine house or hose house then erected, or that might be thereafter erected, by the defendant city, or one telephone for police headquarters, or one for the Mayor's office, or as a further consideration for said alleged grant it was stipulated or agreed in said alleged ordinance or otherwise, that the plaintiff should allow the city the exclusive use of two

feet, or one arm, on each pole for its fire system alarm, pro-
109 vided said fire alarm Telegraph wires were kept three feet from the wires of the plaintiff company, and that such poles should be replaced when needed. Defendant denies that the plaintiff having accepted said franchise, or alleged grant, proceeded to erect an extensive or any complete system or any system of telephone wires in or throughout the City of Owensboro, or that it repaired all or any streets occupied by it where its use in any wise damaged the streets used, or otherwise or at all. It denies that on the faith of the said alleged grant, it expended large sums of money, or any money, in the construction of its telephone system, and defendant has no knowledge or information sufficient to constitute a belief that the plaintiff now has as perfect a system of telephones as is furnished to any town throughout the United States, or that it has expended large sums of money, or any money, in the construction or in the maintenance of its said system of telephones, or that its wires are connected with or terminated at various exchanges owned by the plaintiff in the city of Owensboro or throughout the State. It denies that to accomplish this, or any object, plaintiff has expended large sums of money, or any money, or invested any of its money, or established its business, or any business, or conducted the same upon the faith of the privilege granted to it under the alleged ordinance of December 4, 1889, and denies that it has complied with each and every provision of said alleged ordinance, or any of them, or more than done so. It denies that the plaintiff in virtue of said alleged ordinance, or upon the faith thereof, has built or constructed on Main Street or any street in the City of Owensboro, or between Orchard and Hathaway Streets or elsewhere, a line of forty wires, or any wires; or on Mulberry street, or any street, between McFarland and Fifth Streets, or any street, a line of 60 wires, or any wires; or on Allen street, or any street, from the corner of Seventh to — street, or elsewhere, 40 wires, or any wires; or on Fifth Street, or any street between St. Ann and Syca-
more streets, or between any streets 20 wires, or any wires, or
110 on St. Ann Street, or any street, from Third Street, to Main Street or any street, 11 cables, or any cables, or fifty wires or any wires; or on Frederica Street from the L. & N. Depot, or one square north thereof, or elsewhere, 20 wires, or any wires, or on Frederica Streets 40 wires, or any wires; or on Frederica street, between 3 & 4 streets or any streets, 40 wires, or any wires; or on Frederica Street from Johnson's lane or elsewhere, or one square north, 50 wires, or any wires; on on Fourth, or Frederica, or St. Elizabeth Streets, or elsewhere, 10 wires, or any wires; or on Fourth or Walnut streets 50 wires, or any wires; or on Fourth between Center and Triplett Streets, or elsewhere 20 wires, or any wires; or on Fifth and Triplett streets, or elsewhere, 80 wires, or any wires; or on Seventh and Triplett streets, or elsewhere, 70 wires, or any wires; or on Triplett Street between McFarland Street or elsewhere 50 wires; or to the Texas Railroad and Fr-derica street, 6 or any long distance wires, or on Main Street and Johnston's lane, or else-

where 40, or any long distance wires, or any wires, on any streets in the city of Owensboro.

The defendant, for further answer, denies that this defendant, or the defendants to this action, or any of them, without right, or illegally or unlawfully, or in violation of any right of the plaintiff, are digging holes, or erecting any poles, or are in the act of constructing a line or system of electric wires, or any wires along the streets, or any streets in the City of Owensboro, in or among the telephone lines of the plaintiff, or that they are proceeding without authority of law, or in violation of the plaintiff's right to erect lines or poles, or any poles in or upon the streets, or any of them, where the plaintiff has erected, or now has in operation its line of telephone wires, or any wires which is has, constructed under, or in pursuance of the alleged grant, or franchise alleged to have
111 been ceded to it in the ordinance above referred to, or otherwise; or that they will, unless immediately prevented by an order of this court, erect their lines of electric light poles, or string their wires thereon to the great or irreparable damage, or any damage of the plaintiff. It denies that the defendants, or any of them, are in the course of erecting or constructing said electric light poles or wires, or placing them upon the same side of the street where the plaintiff has erected its poles or telephone wires, or that they are not only doing this, but erecting their electric light poles, or stringing electric light wires in or among the telephone wires which the plaintiff has heretofore constructed, or has in successful operation, under the alleged grant aforesaid, or under any grant. It denies that if the defendants, or any of them are permitted to erect their poles or string their electric light wires in or among the telephone wires of the plaintiff, it will result in great or irreparable loss to the plaintiff, or will completely destroy, or destroy at all, the efficiency of its telephone system, either in the City of Owensboro, or throughout the County of Daviess, or adjoining counties in the State, or throughout its entire system, or elsewhere, or at all. It denies that the wires which the defendants are now placing in and upon the streets of the City of Owensboro, are in close touch, or, in fact, in immediate proximity to the wires which the plaintiff has strung up on its poles under the alleged ordinance aforesaid. It denies that the building or construction of this electric light system as proposed by the defendant will or does create electric current, or any current, upon the plaintiff's telephone wires, or such current or noise as will render them useless. It denies that by reason of the proximity of the defendant's poles or wires to those of the plaintiff, or of the powerful current used by the defendant, or together with its mode of use or manner of construction, or otherwise, currents of electricity are transmitted to, or inducted upon the wires, or any of them, of the plaintiff, in such manner as will render them useless for telephone service, or at all. It denies that
112 the noise produced by the defendant's proposed system of electric wires is loud or continuous, or that the result will be, or is to either prevent or destroy communication by telephone, or the communication of many, or any, of the plaintiff's subscribers

with the exchange, or with each other, or that if it is not forthwith prohibited by order of this court, it will break up or utterly destroy, or destroy at all, the plaintiff's telephone system. It denies that if the defendants are permitted to erect their lines of electric light wires upon the same side of the streets where the plaintiff's wires are strung, or in the midst of its wires, such acts will effectually destroy, or destroy at all, the efficiency of the plaintiff's telephone system. It denies that the electric current which will be conducted over the defendant's lines, which will be necessary in order to enable it to operate its electric light plant, will render it impossible for plaintiff's subscribers to carry on any conversation, or that there will be thereby any invasion or infraction of plaintiff's alleged rights, or that such alleged invasion or infraction is illegal or unlawful, or in violation of the said alleged ordinance, or any ordinance, or in violation of the terms of the said alleged grant to plaintiff. It denies that if the defendants are permitted to complete the construction of their electric light system, or erect it as they are alleged to be doing, among the wires or lines of the plaintiff, which it now has in operation, its alleged contract with the defendant, or any contract, will be impaired, or that it will be deprived of its property, or any of its property, without due process of law, or without compensation, or be denied the equal protection of the law. It denies that the defendants have placed their poles on the same side of the streets, or in exact line with those of the plaintiff, or that defendant's wires, so far as they are strung, or will be strung, if defendants are permitted to string them, are directly in or among those of the plaintiff, in many places, or any
113 places, or so near the wires of the plaintiff as to interfere with the working of the plaintiff's wires, or to touch them, or will render them worthless in consequence of the superior electrical current which will be sent over defendant's wires as compared with that necessary to operate the plaintiff's system, or render them worthless at all, or will result in the destruction of the plaintiff's lines; or that if defendants are permitted to construct their system of electric light wires, as they are now doing, and proposing to do, it will render the use of the plaintiff's wires impracticable, or dangerous in the first degree or any degree, to those who attempt to use plaintiff's system of wires or those who attempt to maintain or operate them, or to any person; or, that the system proposed by the defendants, if allowed to be perfected, will result in danger, or loss of life to those who attempt to use plaintiff's wires, or telephone system, or to anyone; or that plaintiff will be compelled to abandon its telephone system in the City of Owensboro, or at any points communicating with said city; or elsewhere, or at all. It denies that the electric light system which the defendants are now constructing, is being so erected that the electric light wires when strung on poles will come in close proximity to the wires of the plaintiff, or in among them, or in any instance touch them; or that in either case, the efficiency of plaintiff's telephone system, or the safety of all, or any who attempt to use or operate it will be placed in peril, or that the plaintiff's al-

leged franchise or property will be utterly or totally destroyed, or destroyed at all. It denies that the defendants are proposing to construct, or that they are now in process of constructing, a system of electric light wires which they propose to operate in or upon or under the streets of the defendant city in the midst of or among the wires or poles, or any of them, which the plaintiff has heretofore constructed under the alleged franchise above referred to, or at all. It denies that the defendants, or any of them, are proposing to build, or are building, or will complete and operate, un-
114 less prevented by the orders of this court, an electric light plant in or among the wires or lines of the plaintiff, within the corporate limits of the City of Owensboro, for the purpose of lighting the streets of the city, or for the purpose of furnishing to individual citizens of said city, electric lights for their stores, offices, business houses, shops, restaurants, saloons, or residences, or for any purpose, or for the purpose of operating machinery of private individuals, all of which or any of them they propose to carry on, or conduct, for private gain, or profit to the detriment, or to the absolute destruction, or destruction at all, of the business of the plaintiff. It denies that the plaintiff is now, or has been for many years, or any time, in the use or enjoyment of any right or franchise to occupy the streets, or any of them, before the defendant attempted to occupy the streets of said City with its electric light wires, or that the plaintiff's rights to keep said streets is a vested or inalienable right, or any right; Or that if the defendants, or any of them, are permitted to complete the construction of their electric light system, or put the same into operation as they are proceeding to do, the plaintiff will be deprived of its property, or any of it, without due process of law, or that it will be thereby or at all denied the equal protection of the law; or that the obligations of the alleged contract, or any contract, between the plaintiff and the defendant city will be thereby, or otherwise impaired or violated. It denies that the defendants, or any of them, have no right to interfere with the plaintiff, or with the reasonable exercise of its franchise, or that they are now so doing; or that they will persist in so doing unless restrained by order of this court. It denies that the plaintiff will suffer irreparable or any damage by the completion or erection of said electric light system, or that its property will be thereby destroyed or injured, that its alleged franchise will be rendered worthless, or that irreparable or any in-
jury will result to the plaintiff from the delay in getting
115 notice, or an injunction, or that it did not have time in which to give notice for a preliminary injunction, because the defendants were in process of constructing the electric light system as claimed in the petition or for any reason.

(II.)

The defendant, City of Owensboro, for further answer to the plaintiff's petition, says that on the 4th day of December, 1889 an ordinance was passed by the Common Council of the said City

whereby it was attempted to grant to the Cumberland Telephone Company the privilege of erecting and maintaining upon the public streets and alleys of the City of Owensboro Telephone poles of certain size and dimensions, and of keeping wires thereon, and connecting the same with buildings where telephone stations might be established, provided the same should be so kept as not to interfere with travel upon the streets, or the substantial use thereof by the inhabitants of the City.

By the second section of said ordinance it was provided that the said company should erect only one line of poles on the street, except for the length of one block upon the street upon which the exchange building should be located, where the wires of said company enter the exchange building, and where the said company might erect and maintain its poles on both sides of said street, and the lowest wires of said company should not be less than 25 feet from the ground, except where said wires enter said exchange building or telephone station.

And it was further provided in said second section as follows, to-wit:— "Nothing in this ordinance contained, shall be construed as an exclusive right to said Company to erect and maintain poles upon the streets and alleys of said City, and no obstruction shall be placed by said company to the erection and maintenance of poles by any other person or company; such company shall enjoy such rights in common with all other persons, or companies, to
116 whom said City may see proper to extend the same right."

And by the sixth section of said ordinance, it was provided as follows, to-wit:— "This ordinance may be altered or amended as the necessities of the City may demand." This is the same ordinance referred to in the plaintiff's petition, and a certified copy thereof is herewith filed as part hereof, marked "A."

The defendant further says that there was not at the time of the passage of said alleged ordinance any legislative authority, or any law in existence, which authorized or empower- the Mayor and Common Council of said City, or said City, to grant to said telephone company, or any telephone company, any right or privilege to erect poles or string wires or carry on the business of a telephone company within the corporate limits of the City of Owensboro.

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The defendant for further answer says that under and pursuant to express authority contained in the charter of the defendant, City of Owensboro, said City on the 19th day of February, 1900, passed an ordinance providing for the erection and maintenance of an electric light plant in said City, for the purpose of furnishing electric light for the use of the City of Owensboro, for lighting the streets, alleys and public places, and its public buildings, and furnishing lights to the residents of the City of Owensboro; and that on the 25th day of July, 1900, the defendant City entered into a contract with its co-defendant, The Westinghouse, Church, Kerr & Co., whereby its said co-defendant agreed, for the consideration of $43,700.00 to construct, erect and install the said electric light plant, and furnish all the machinery and materials,

and do all the work for the same, and to complete and deliver the same to the City of Owensboro on or before the 25th day of December, 1900. For the purpose of carrying said contract into effect, the said City has purchased a parcel of ground, and has erected thereon a large brick building, with smoke stack, and appurtenances, at a cost of about $8,000.00; and under and
117 pursuant to said contract said Westinghouse, Church Kerr & Co., immediately after the making of the same entered upon the performance thereof, and have placed in said building much valuable machinery worth the sum of $—, and have erected — poles, sufficient for the stringing of approximately 20 miles of wire thereon, along and upon the streets of said city under the direction of the Common Council of said City, for furnishing to said city 125 arc lamps for the purpose of lighting the streets, alleys, and public places of said City, and for the purpose of furnishing electric light to su-h of the inhabitants of said city as may contract therefor; and that the said contractors in the performance of said contract have expended large sums of money, and the said City of Owensboro has from time to time paid to said contractors for the machinery and material furnished, and labor performed, large sums of money, to-wit, $—; and said contractors are now, and were at the time of the suing out of the restraining order herein, actively engaged in the execution and performance of said contract, and had a large number of mechanics and laborers employed, namely over 140 men; and the said contractor on the said 25th day of July, 1900 entered into a bond with the City of Owensboro, with good and sufficient security, in the penal sum of $23,000, binding and obligating itself to execute and perform said contract in accordance with the terms thereof on or before the said 25th day of December, 1900.

Defendant's says that all of said poles have been erected along the streets and alleys, and public places in the city of Owensboro at points at which it was necessary to erect them in order to furnish said City with light, and have been erected and all the work done on them, in a skillful and prudent manner, and of a height that was necessary for safety to light the City and furnish light to the inhabitants thereof; and that they could not have been erected at any other place or places along the streets and alleys of said City so as to light the said City as it should be lighted, and furnish light to the inhabitants thereof; and said poles have
118 en so erected as that the wires when strung thereon will be approximately 25 or 27 feet above the surface of the ground; that it would be dangerous to life and property and to the use of the streets, to place them at a greater or less height above the surface; and that the wires are being, and will be places on said poles in the most skillful, prudent and workmanlike manner; and that the current is not on the wires now, and will not be put on any of the wires until about the 25th day of December, 1900.

Defendant says that if it is in error in alleging as it has heretofore in this answer, that there was no law or authority for the passage of the ordinance of December 4, 1889, empowering the said tele-

phone company to erect its poles and string its wires over the streets of the City, and carry on a telephone business in said City; then it pleads and relies upon the authority reserved in said ordinance to the City of Owensboro to alter and amend said ordinance.

The defendant further says that the Common Council of the City of Owensboro on the 17th day of November, 1900, passed an ordinance entitled "An Ordinance Requiring all Telephone Companies, Telegraph Companies, Electric Light Companies, Street Railway Companies; owned or operated by Private Corporations to Place Their Wires not less than Thirty-Five Feet Above the Surface of the Ground, and for other Purposes," whereby all Telephone companies carrying on business in the City of Owensboro were required to place all of their wires at least 35 feet above the surface of the ground, or curbstone of the street, and to be so strung and arranged as not to come in contact with, or interfere in any manner with the wires used for the transmission of electric current belonging to the City of Owensboro, within 40 days from the passage of said ordinance and the defendant says that the plaintiff herein, can, within ten days, adjust all of its wires in said City of Owensboro at the height required by said ordinance, and so as not to interfere with the wires of the electric light plant in process of construction by the Westinghouse, Church, Kerr & Co., and that it is not the purpose of the City, nor will there be any electric current put
119 upon the wires of the electric light company before the 20th day of December next. A duly certified copy of said ordinance is herewith filed as part hereof marked "B."

Wherefore the defenda-t prays that the plaintiff's petition be dismissed, and that it recover its costs, and for all proper and general relief.

GEO. W. JOLLY,
City Attorney.

W. P. Small says that he is Mayor of the City of Owensboro, and that he believes the statements contained in the foregoing answer are true.

W. P. SMALL, *Mayor.*

Subscribed and sworn to before me by W. P. Small, Mayor of the City of Owensboro, this 19th day of November, 1900.

C. C. STUART, *D. C.*

An exhibit, marked "A", filed with the foregoing answer is next copied and is in words and figures as follows, to-wit:—

EXHIBIT "A."

Min. Book F., Dec. 4th, 1889, page 157.

The following ordinance after being twice read was enacted by the following vote to-wit: Ayes, Mess. Baer, Brotherton, Vargason, Cullen, Higdon, Decker; Noes, None. Viz:—

Be it ordained by the Mayor and Common Council of Owensboro, Ky.: That the Cumberland Telephone Company its successors and assigns is authorized and hereby granted the right to erect and maintain upon the public streets and alleys of said city any number of Telephone poles of proper size, straight and shaved smooth, set plumb and kept erect, and any number of wires thereon with the right to connect such wires with the building where Telephone stations are established, provided such poles shall be located and kept so as not to interfere with the travel upon said streets or alleys of the substantial use thereof by the inhabitants of said city.

SEC. 2. The said Cumberland Telephone Company shall erect only one line of poles on a street except for the length of one block on the street upon which the exchange building may be located, and where the wires of said company enter such exchange building the said company shall have the right to erect and maintain its poles on both sides of such streets and the lowest wire of said Telephone Company shall not be less than twenty feet from the ground, except where such wires enter the exchange building or Telephone stations.

Nothing in this ordinance contained shall be construed as an exclusive right to said Company to erect and maintain poles upon the streets and alleys of said City, and no obstruction shall be placed by said company to the erection and maintenance of poles by any other person or company, such company shall enjoy such rights in common with all other persons or companies, to whom said city may see proper to extend the same right.

SEC. 3. The said Telephone company shall repair all streets and alleys it may enter upon and use for the purpose herein provided, which by the acts of said company or persons in its employ shall have become injured or damaged or have made unsafe.

All proper precautions and safeguards shall be used to prevent such use from becoming either injurious or annoying to the inhabitants of said City, and should any damage or injury result to any person or property by reason of the erection and maintenance of such poles, or the failure to keep the streets and alleys in repair as herein required, and the said city shall be held liable by reason thereof, such company shall pay all damages and costs resulting therefrom to the parties injured, or to the city if paid by her.

121 SEC. 4. The rights and privileges hereby granted to said Telephone Company are upon the terms, and conditions following, viz:— That said Company shall furnish free of charge one telephone for each engine or hose house, now erected or which may hereafter be erected by said city, one for police headquarters and one for the Mayor's office making at this time only two such telephones to be furnished by said company for the use of the city, shall be kept in good order for constant use by said company. Said company shall also allow the city the exclusive use of two feet of one arm on each pole for its fire alarm telegraph; The fire alarm telegraph poles of the city may be used by said company for its wires provided such wires be kept two feet from the said fire alarm tele-

graph wires, and such poles used by the said telephone company shall be replaced by it when needed.

SEC. 5. All poles of said telephone company shall be set close to the inner side of the sidewalk curbing.

SEC. 6. This ordinance may be altered or amended as the necessities of the city may demand.

This ordinance shall be in force from and after its passage.

A copy attest:

W. M. O'BRYAN, *City Clerk.*

The foregoing Exhibit is endorsed on the back as follows:
Exhibit "A" filed with the Answer of City.

Still another Exhibit is copied and is as follows:—

EXHIBIT "B."

An ordinance entitled "An ordinance requiring all telephone companies, telegraph companies, electric light companies and street railway companies owned or operated by private corporations to place their wires *b*ot less than thirty five feet above the surface of the ground and for other purposes," was publicly read before
122 the Common Council the second time by the City Clerk, and on motion of Mr. Delker, seconded by Mr. McCarrol was put upon its second and final passage, and the roll of members being called Messers Ames, Breidenbach, Cary, Delker, McCarroll, Millett, Nevitt, Ogden, Steitler, and Williams voted yea, nays none, and thereupon the same was declared passed, said ordinance is in words and figures as follows:

An ordinance requiring all telephone companies, telegraph Companies, electric light companies and street railway companies owned or operated by private corporations to place their wires not less than thirty five feet above the surface of the ground and for other purposes.

Be it ordained by the Common Council of the City of Owensboro:

SEC. 1. That all wires for the transmission of electric current, owned by any telephone, electric light, telegraph, railway or power company, or owned by any person, company or corporation and used for the transmission of electric current for said purposes or any purpose, be and they are required to place all such wires at least thirtyfive feet (35) above the surface of the ground or curbstone of the street, and all such wires shall be so strung or arranged as not to come in contact or interfere in any manner with the wires used for the transmission of electric current belonging to the city of Owensboro.

SEC. 2. That if any person, company or corporation shall willfully neglect fail or refuse to comply with the provisions of the first section of this ordinance for the period of more than forty

(40) days after the final passage of this ordinance, such person, company, or corporation so offending shall, upon conviction be fined not less than twenty five nor more than one hundred dollars, for each offense and each and every wires so remaining less than thirty-five feet above the surface of the ground or street curb shall be and constitute a separate offense.

123 Provided, however, that this section shall not apply to wires of telephone or telegraph companies or the place where the same enters any buildings or building for the purpose of serving customers or at telephone exchanges or central offices, or the telegraph offices. And provided further that it shall not apply to trolley wires used by any street car company.

SEC. 3. That no telephone company or telegraph company shall have or maintain more or exceeding forty wires or any single pole or tower, and if any company shall have or maintain more wires on any single pole or tower than forty in number, forty days after the passage of this ordinance, the company so offending, shall upon conviction, be fined not less than ten dollars and not exceeding fifty dollars, and each wire so had or maintained on any single pole over forty in number and each twenty four hours the same shall so remain, shall constitute a separate offense.

SEC. 4. That it shall be unlawful for any telephone company, telegraph company, electric light company, or power company, or street railway company to erect any poles in the city of Owensboro or to acquire or use any poles from any other company already erected, without special permission of the Common Council, first obtained. And if any person company, or corporation shall violate the provisions of this section, such person, company or corporation so offending shall, upon conviction, be fined no leses than twenty-five dollars and not exceeding one hundred dollars; and each pole or tower so erected without said permission and each pole so acquired or used without said permission so obtained shall be and constitute a separate offense.

SEC. 5. This ordinance shall go into full force and effect on its final passage.

Approved Nov. 17th, 1900.

W. P. SMALL, *Mayor.*

Attest:
W. M. O'BRYAN, *City Clerk.*

124 I, W. M. O'Bryan, City Clerk do certify that the above four (4) pages are a true and complete copy of an Ordinance entitled, "An Ordinance requiring all telephone companies, telegraph Companies, Electric Light companies, and street railway companies owned or operated by private corporations to place their wires not less than thirty five feet above the surface of the ground and for other purposes" And of the final passage of same.

Given under my hand this the 17th day of November, 1900.

W. M. O'BRYAN, *City Clerk.*

Mayor's Office, Owensboro, Ky., Nov. 17, 1900.

By virtue of the power vested in my by law, I hereby call a Special Session of the Common Council of the City of Owensboro, on this, the 17th day of November, 1900 at the Mayor's Office at 10 o'clock, A. M. for the purpose of considering An ordinance requiring all telephone companies, telegraph Companies, Electric light Companies and Street Railway Companies owned or operated by private Corporations to place their wires not less than thirty five feet above the surface of the ground and for other purposes.

Given under my hand this the 17th day of November, 1900.

(Signed) W. P. SMALL, *Mayor.*

A copy attest:

W. M. O'BRYAN, *City Clerk.*

Mayor's Office, November 17th, 1900.

The Common Council of the City of Owensboro met in special session Mayor Small presiding and Messers Ames, Breidenbach, Cary, Delker, McCarroll, Millett, Nevitt, Ogden, Steitler and Williams present X—.

125 I. W. M. O'Bryan, City Clerk, do certify that the above is a true and complete copy as the same appears of record in Minute Book 1 page 210 in my office.

Given under my hand this the 17th day of November, 1900.

W. M. O'BRYAN, *City Clerk.*

The foregoing Exhibit is endorsed on the back as follows: Exhibit "B" filed with the Answer of City of Owensboro.

The foregoing Answer of the City of Owensboro, together with its exhibits, is endorsed on the back as follows:

Filed Nov. 19th, 1900. Att: S. W. Bedford, Clerk.

The demurrer and Reply, to the Answer and Amended Answer, filed Jany. 14, 1901, is next copied and is in words and figures as follows, to-wit:

Demurrer and Reply.

The plaintiff, the Cumberland Telephone and Telegraph Company, demurs to the second paragraph of the original answer because the same is not good or sufficient in law and presents no defense.

Second. It demurs to the amended answer filed December 10th, 1900, because the same is not good or sufficient and is irrelevant, immaterial and presents no defense, to the petition herein.

SWEENEY, ELLIS & SWEENEY,
Att'ys for Plaintiff.

126 Without waiving the foregoing demurrers, but insisting upon the same, plaintiff for reply to the second paragraph of the original answer denies that the Ordinance of December 4th, 1889, passed by the Common Council of the City of Owensboro, provided that plaintiff Company should so keep its telephone stations as not to interfere with travel upon the streets of the substantial use thereof, by the inhabitants of the City.

The ordinance which is filed with the petition plainly states the terms of said grant as to the provisions of the said ordinance of December 4th, 1889, all its terms are fully and accurately set forth therein, and it denies each allegation of the answer which is not consistent with or which is not supported by the terms of the said ordinance.

It denies that at the time of the passage of said ordinance there was not any legislative authority or any law in existence which authorized or empowered the mayor and common council of said City or said City to grant to plaintiff company any right or privilege to erect poles or string wires of a telephone company within the corporate limits of the City of Owensboro.

It denies that under or pursuant to express authority or any authority in the charter of the defendant City of Owensboro on the 19th day of February, 1900, it passed or had any legal right to pass any ordinance or to contract with the Westinghouse, Church, Kerr — Company to construct or install, or erect electric light plant or to complete or deliver the same to the City of Owensboro or to do so in such a way as to unreasonable interfere with the franchise grant theretofore made to this plaintiff.

It denies that defendant City in erecting poles for its electric light plant has placed the same at points at which it was necessary to erect them in order to furnish the said city with lights or that they have been erecting, or that the work that has been done they have done in a prudent or skillful manner or at a heighth that was necessary to light the city or to furnish light to the inhabitants thereof, or that they could not have been erected at any
127 other places or place along the streets or alleys of the said city so as to light the said city as it should be lighted or furnish light to the inhabitants thereof.

It denies that it would have been dangerous to life or property or to use the streets to place or string the wires of the electric light company at a greater or less height above the surface or that the wires of the electric light company are to be placed on said poles in the most skillful, prudent or workmanlike manner.

It denies that the City in the grant to it of December 4th, 1889, reserved any right or authority to so alter or amend the grant to this plaintiff as to in any wise interfere with its substantial or material rights.

It states that the ordinance alleged to have been passed by the Common Council of the City of Owensboro on the 17th day of November, 1900, entitled "An ordinance requiring all telephone Companies, Telegraph Companies, Electric Light Companies, Street Railway Companies, owned or operated by private corporations to

place their wires not less than thirty-five feet above the surface of the ground and for other purposes," was unreasonable, illegal or void, and the same conferred no right or authority on the defendant City to arbitrarily require either the lifting or lowering of the plaintiff's wires which it had erected or was maintaining upon the streets of the City of Owensboro, under its grant of December 4th, 1889.

It denies that the Common Council of the City of Owensboro had any power or legal authority to arbitrarily require that it should place its wires at less than 35 feet above the surface of the ground or curb stone, of the street or that it should so string or erect its wires as not to come in contact with and interfere in any manner with the wires used for the transmission of the electric current belonging to the City of Owensboro.

Moreover it states that the provision in the said ordinance requiring this alteration in its lines of wires to be made within forty days from the passage of said alleged ordinance was illegal, unlawful and unreasonable and the same was and is void.

128 It states that under its grant of December 4th, 1889, it acquired a vested right to occupy one side of the streets of the City of Owensboro, with its system of wires and that that right was a vested one which could not be repealed or modified.

It states further that it was and is perfectly feasible and practicable for the City of Owensboro to construct and maintain its line of electric light wires in and upon the streets of the City of Owensboro without in any wise conflicting with the telephone system which the plaintiff constructed and was and is maintaining under its grant aforesaid.

The said City has no power or authority to arbitrarily require it either to lift or lower its wires.

It states that there was and is no necessity for such change in its system, or the lifting or lowering of its wires in order to accommodate the electric light plant which the defendant city is proposing to operate.

For reply to the amended answer plaintiff denies that it is impossible for the City of Owensboro to erect its poles or string its wires at the proper height for the protection of the City and public, in the ordinary use of the streets or to prevent injury, or danger or damage to the property of the people of the city except as the plaintiff shall raise its wires on all or any of the streets, alleys, or places mentioned in the plaintiff's petition or at all or any of the places where the city's electric light wires are string or placed.

It denies that it has erected its poles or strung its wires on both sides of several of the streets of the city except as it has done so pursuant to and in conformity to the terms of its grant.

If any of its poles or its wires are strung not in accordance with the terms of its grant, of December 4th, 1889, it does not
129 claim any right to the use thereof and will cheerfully conform to the letter and the spirit of its grant.

While it is true that it is best for the telephone company to have its wires strung above those of an electric light company the plaintiff

denies that there is any necessity for the stringing of the electric light wires over twenty-five or thirty feet above the ground or above the curb stone, it says that the defendant city in stringing its electric light wires at said height has done so arbitrarily that it could have strung them at a lower height from the ground with perfect safety to the lives, property, convenience of the public, it denies that the ordinance of November 17th, 1900, is for the purpose of protecting the lives or health, comfort, or convenience of the inhabitants of the City or of the public generally or for the protection or the security of the property of the City or its inhabitants.

Plaintiff further states that its system of telephone wires and the system of electric light wires operated by the defendant City could be and can be practically constructed and operated without the slightest inconvenience, one to the other and this too without subjecting this plaintiff to the enormous cost of arbitrarily changing its system by lifting its wires.

It denies that the City has the right or the authority to require it arbitrarily to change, alter, lift or lower its wires, except perhaps in the case of public necessity and no such public necessity exists in this case whatever.

SWEENEY, ELLIS & SWEENEY,
Att'ys for Plaintiff.

W. D. Burford says he is the superintendent and general manager of the plaintiff company and that the statements in the foregoing reply are true as he verily believes. He further says that this reply was not filed sooner because the record was mislaid in the Clerk's office and after it was found one of his attorneys was necessarily absent from the State of Kentucky, and the other was engaged in a trial in the Criminal Division of the Daviess Circuit court.

130

W. D. BURFORD.

Subscribed and sworn to before me by J. D. Burford, this the 14th day of Jany. 1901.

GLEN RICE, *Ex. D. C.*

The foregoing Demurrer and Reply is endorsed on the back as follows:

Filed Jany. 14-1901. Att.: S. W. Bedford, Clerk.

The judgment entered herein is next copied and is as follows, to-wit:

Judgment.

In Equity. No. 7984.

THE CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY, Plaintiff,
vs.
CITY OF OWENSBORO, ETC., Defendants.

Judgment.

This cause coming on to be heard on the petition, answers, replies, and on the depositions and other testimony in the case, and the court having the record read and having heard argument orally and by brief, and having fully considered the questions of law and fact in the cause, delivered a written opinion herein, which is ordered to be filed and made part of the record and pursuant thereto the court doth now order, adjudge and decree that the plaintiff is entitled to no relief and that it take nothing by its said petition, and that the same be and the same is now dismissed. And it is further adjudged that the defendants, the City of Owensboro and the Westinghouse, Church, Kerr & Company, recover of the plaintiff, the Cumberland Telephone and Telegraph Company, their costs respectively
131 herein incurred and may have execution therefor.

To all which judgment of the court herein the plaintiff objects and excepts and prays an appeal to the court of appeals, which is granted.

The foregoing judgment is endorsed on the back as follows: "62-367" Nov. 14, 1903.

STATE OF KENTUCKY,
Daviess Circuit Court:

I, Tandy L. Harl, Clerk of the Daviess Circuit Court, do hereby certify that the foregoing forty-six pages constitute a true, full and complete transcript of the Petition, Answer, Demurrer and Reply to the Answer and Amended Answer, and Judgment in the action of Cumberland Telephone & Telegraph Company, vs. City of Owensboro, &c., as same appears to me from the records in my office; of which records, I am the legal custodian.

Given under my hand and seal of office, this February 11, 1910.

[SEAL.]

TANDLY L. HARL,
Clerk Daviess Circuit Court.

132 Daviess Circuit Court.

CUMBERLAND TELEPHONE & TELEGRAPH CO., Plaintiff,
vs.
CITY OF OWENSBORO, Defendant.

Opinion.

This case was heard some time since and taken under advisement. The action was instituted during the progress of the erection, by the city, of an electric light system, the object of the action being to obtain an injunction against the City restraining it from the completion and operation of its light system on certain lines, on the alleged grounds that it would irreparably injure and damage the plaintiff's telephone system, pre-existing in the city under a grant and contract by and with the City. An application was, on the pleadings and elaborate proofs by affidavits, made to me as Judge of the Circuit Court for an injunction. I was then of the opinion that the plaintiff was not entitled to an injunction but being willing that it should havr an early opportunity of having the matter considered by the appellate judges, I granted an injunction and on my own motion, forthwith dissolved it; And thereupon the plaintiff applied to one of the appellate Judges, Hazelrigg, as I am informed, for a reinstatement of the injunction. Judge Hazelrigg refused the application, and, as I have also been informed delivered a written opinion, or response to the application. This I have never seen and it seems not to be in the record. Since that time till the Oct. Term of the Court, the case has rested, except that the plaintiff and defendant alike have taken depositions. In the meantime the City completed its electric light system and put it in operation, and plaintiff has continued to maintain and operate its telephone system. The case presents some interesting topics for discussion and I might be profited by a closer and fuller investigation of authorities and discussion of the subjects presented by respective counsel in their able and exhaustive briefs, and the facts and theories suggested in the evidence, but my limited time and opportunities for investigation and discussion renders a perfect mastory of the case by
133 this court impracticable.

I was strongly convinced on the original application that an injunction ought not to be granted, and in my opinion no change has taken place in the principles and legal ideas then actuating the Court. Indeed the present situation is more strongly against it, on the idea that an application for injunction will always be denied, "when it appears that the act to be enjoined has already been committed." Though it may appear that the alleged evils apprehended by plaintiff, expressed in its petition have been fully realized by defendant's consummation of its then projected work, I deem that no argument in favor of now granting the injunction.

In passing upon the question of granting or refusing the injunction I deem it wholly unnecessary to pass upon the validity *of* un-

validity of the ordinance discussed. And in fact, I deem it unimportant for this Court to give reasons for its judgment.

I am satisfied under the facts and what I conceive to be the law in this case, that an injunction should be refused which I accordingly do. The judgment should be so drawn as to give plaintiff an exception, prayer for appeal to the Court of Appeals and an order granting the Appeal.

(Signed) W. T. OWEN, *Judge.*

134 And on another day of said term of said court, viz., on the 9th day of February, A. D. 1909, the following order was entered, to-wit:—

This day came the complainant by Wm. L. Granberry and Fairleigh, Straus and Feirleigh, its counsel. Came also the defendant, the City of Owensboro, Kentucky, by R. W. Slack, its Counsel. The complainant, by its said counsel, moves the Court to grant it a temporary injunction, pendente lite, in accordance with the prayer of the bill herein.

Came again the defendant by its said counsel, and moves the Court to dissolve the restraining order or temporary injunction granted herein, and also moves the Court to dismiss the complainant's bill of complaint for lack of equity on the face of the bill.

Came again the defendant by its said counsel, and filed its demurrers to the compainant's bill of complaint herein.

This cause coming on to be heard on the complainant's motions for an injunction pendente lite, as also upon the defendant's motion to discharge the restraining order and to dismiss the bill; and also upon the defendant's demurrers to the complainant's bill of complaint, and the same having been argued by counsel, and the Court not being fully advised thereof, takes time.

The demurrer above referred to is as follows:

135 UNITED STATES OF AMERICA:

In the United States Circuit Court for the Western District of Kentucky, Owensboro Division.

In Equity.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF OWENSBORO, KENTUCKY, Defendant.

Demurrer by Defendant.

The defendant, The City of Owensboro, comes now by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, and demurs and says, that the allegations in the bill in this cause are

insufficient in law to entitle the complainant to any relief; and for causes of demurrer states the following:—

1. That the court has no jurisdiction of this cause; that it appeareth by the complainant's bill that it states no cause of action arising under the Constitution or laws of the United States; no cause of action within the jurisdiction of this court; that this court has no jurisdiction to consider, decide, or determine any of the matters or things set up in said bill and that it is not entitled to the relief prayed for against the defendant.

2. That it appeareth by the complainant's own showing by its said bill of complaint that it is not entitled to the relief
136 prayed against this defendant and that no cause of action and no ground for equitable or any relief is stated against this defendant herein.

Because, on December, 4, 1889, when the ordinance of that date was adopted by the Common Council of the City of Owensboro, as stated in Paragraph 2 of Complainant's bill, the only authority of the said Common Council to adopt said ordinance was the authority provided by the charter of said city enacted by the legislature of Kentucky and approved by the Governor thereof, March, 18, 1882, the title of said act being "An Act creating a new charter for the City of Owensboro" Chap. 461, Acts of 1882, (and of which said act this court will take judicial notice,) and under said act, which was in force on December 4, 1889, said Common Council had no power or legislative authority, express or implied, to adopt said ordinance or to make any enforcible contract with complainant, or to any person or corporation, or to grant to complainant, or any person or corporation, the use of the streets of said city for the purpose stated in said ordinance, or any purpose, or to grant to complainant, or any person or corporation, any privilege, authority or franchise to erect poles or wires in the streets or to maintain any system of telephones therein, and no right existed by the charter of complainant on said date to occupy the streets of said city with telephone poles and wires and said bill of complaintant fails to show any such rights under complainant's charter, and further because it appears from complainant's bill and its charter, and amendments thereto filed as an Exhibit therewith, that complainant company was incorporated on the 8th day of June, 1883, by Articles filed in the Clerk's office of the County Court of Henderson County, Kentucky, and that under said articles the existance of said corporation commenced on the 8th day of June, 1883, and terminated in 25 years from said date and its corporate existance ceased on June 8, 1898, or upon its consolidation with the Great Southern Telephone & Tele-
137 graph Company on March 4, 1898, or its consolidation with the Ohio Valley Telephone Company on the 27th of January, 1900, as shown by said exhibits and if said alleged grant under said ordinance of December, 4, 1889, mentioned in complainant's bill was valid, then said ordinance only granted the right to said Cumberland Telephone Company to maintain its poles and wires in the streets of the city during the life of said company, until one or the other of said dates above mentioned.

3. It demurs especially to so much of Paragraph 3 of complainant's bill as alleged that there was not a sufficient investigation made by the Common Council of the defendant to enable it to fix just rates and as questions the motives of the Common Council and its members in enacting the ordinance fixing the rates because the same is not material and the court will not enter into an inquiry as to the motives of the members of the Common Council in enacting same inasmuch as the power exercised in fixing rates is and was legislative in character and was exercised by virtue of legislative power delegated by the charter of the City.

4. It demurs especially to said bill and part of Paragraph 2 thereof as relates to the ordinance fixing rates because every presumption must be indulged that the rates prescribed by the ordinance mentioned therein are just and lawful rates and said bill fails to state facts sufficient to show that said rates are just or unreasonable, and because it is the duty of the complainant to make a fair, practical test of the rates fixed by said ordinance and thus ascertain whether or not these rates will prevent the complainant from obtaining a fair return upon the value of its property employed in the service after the payment of legitimate expenses of operating before being granted any injunction herein.

5. Defendant especially demurs for the foregoing reasons to Par. 1 of said bill

137½ 6. Defendant specially demurrs for the foregoing reasons to Par. 2 of said bill.

7. Defendant Specially demurs for the foregoing reasons to Par. 3 of said bill.

8. Defendant specially demurs for the foregoing reasons to Paragraph 5 of said bill.

Wherefore for divers and other good causes of demurrer appearing on said bill, this defendant doth demur thereto and it prays the judgement of the court whether it shall make any answer thereto, and it prays to be hence dismissed with costs.

GEORGE W. JOLLY,
ROBT. W. SLACK,
Solicitors for Defendant.

STATE OF KENTUCKY,
County of Daviess, ss:

The defendant, City of Owensboro, by W. M. O'Bryan, its Mayor, says the foregoing demurrers are not interposed for delay.

W. M. O'BRYAN.

Subscribed and sworn to before me by W. M. O'Bryan, Mayor of the City of Owensboro, this the 8th day of February, 1909.

JULIA E. HARPER,
Examiner, Daviess County, Kentucky.

138 We, the undersigned attorneys for defendant, do certify that the for-going demurrers are in our opinion well founded in law.

R. W. SLACK,
City Attorney, Solicitor for Defendant.

139 And at another term of said court, viz., held for its May Term, 1909, continued and held on the 4th day of May, A. D. 1909, the following order was entered, to-wit:—

This day came the defendant, City of Owensboro and moves the Court:

1st. To dissolve the restraining order heretofore granted herein.

2nd. The defendant also further moves the Court to dismiss the bill because it appears on the face of the bill that the Court has no jurisdiction of the matters set up in the bill, and because no cause of action is alleged or set forth in the bill.

And the Court being fully advised thereof it is ordered that said motion be and the same is hereby overruled.

The motion above referred to is as follows:—

140 *Motion.*

In the Circuit Court of the United States for the Western District of Kentucky, Owensboro Division.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF OWENSBORO, Defendant.

I.

The defendant, The City of Owensboro, moves the Court to dissolve and discharge the restraining order of temporary injunction granted herein.

II.

The defendant moves the Court also to dismiss the complainant's bill for lack of equity on the face of the bill.

R. W. SLACK,
Attorneys for the Defendant.

141 Circuit Court of the United States, Western District of Kentucky, at Owensboro, *set*:

No. 227.

CUMBERLAND TELEPHONE AND TELEGRAPH CO., Complainant,
vs.
CITY OF OWENSBORO, Defendants.

Motions.

The defendant City of Owensboro moves the Court:

1st. To dissolve the restraining order heretofore granted herein.

2nd. The defendant also further moves the court to dismiss the bill because it appears on the face of the bill that the court has not jurisdiction of the matters set up in the bill; and because no cause

of action is stated within the jurisdiction of this Honorable Court and no cause of action is alleged or set forth in the bill.

R. W. SLACK AND GEO. W. JOLLY,
Atty. Defendant.

May 4, 1909.

142 And on another day of said term of said court, viz., on the 7th day of March, A. D. 1910, the following order was entered, to-wit:—

This day came the Cumplainant by James F. Fairleigh, and C. M. Finn, its counsel. Came also the defendant by R. S. Todd and George W. Jolly, its counsel.

The complainant by its said counsel moved the court to set this cause for hearing upon the plea and bar and demurrer filed herein on February 7th, 1910, at such time and place as may be designated by the Judge of this Honorable Court.

And at another term of said court, held for its May Term, 1910, continued and held, viz., on the 17th day of May, A. D. 1910, the following order was entered to-wit:—

This day came the complainant by Wm. L. Granberry, & C. M. Finn, its counsel. Came also the defendants by George W. Jolly and R. S. Todd, its counsel.

The defendant, City of Owensboro, by its counsel, Mr. George W. Jolly, and R. S. Todd, city attorney, withdraws its demurrers for irrelevancy, immateriality, impertinency, redundancy and multifariousness, filed herein on the seventh day of February, 1910, and in lieu thereof moves the Court to strike from the bill of Complaint herein all parts of said bill relating to the ordinance passed by the Common Council of said City of Owensboro in August, 1908, entitled "An ordinance regulating the charges for telephone service in the City of Owensboro," prescribing or fixing rates and charges to be made for the rent of telephones and for telephone service, and particularly each and all of the following parts of said bill, on the grounds that same are irrelevant, immaterial, impertinent,
143 redundent and multifarious, to-wit:

1. "That it owns and operates more than five hundred telephone exchanges in seven different states, including an exchange in the City of Owensboro, Kentucky, its various exchanges are connected each with the other by more than 100,000 miles of toll lines and on July 1, 1908, the number of telephones in use by the subscribers of your orator amounted to over 160,000, and any one or more of these subscribers can with the aid of toll lines, be connected with and converse with any other of the 160,000 subscribers.

The capital expended in constructing these connections, and which are given to your orator's subscribers, amounts to more than twenty million dollars, and the facilities cannot today be reproduced or duplicated for that amount of money, nor within less time than ten years. The toll lines of your orator radiating from the City of Owensboro, Kentucky, reach practically every point of importance and nearly every cross-road store in that section of the country, and

these lines have been constructed from time to time at the request of the business interests of said city, and for the purpose of making more valuable the plant and equipment of your orator in said city."

2. Your orator further states that the exchange at *at* Owensboro is constructed by erecting — a central point in said city a building in which is located a switchboard, and from this board lines of small wires are carried upon poles to the business houses or residences of each subscriber and there connected with the telephone instrument. In this way each subscriber can signal the operator at the central office and receive connection with any other subscriber. For this character of service a monthly rental is paid, which entitles the subscribed to receive unlimited service from the local exchange. In the same manner, the toll lines are brought into the city, attached to the same poles, and connected to the switchboard. Any subscriber is entitled to signal the operator at the exchange and receiver connection over the toll lines to other cities and places, and there be connected with any other of your orator's 160,000 subscrib-
144 ers. The only charge for this character of service is, generally speaking, one-half of one cent per air mile between the two cities thus connected for each three minutes' conversation. This is the exact rate charged non-subscribers who use the toll lines from the central exchange; and, your orator states that its toll lines entering and leaving the City of Owensboro, Kentucky, are erected and maintained along and on the same poles which carry the wires to the local subscribers."

3. "Said exchange not only embraces service with in the corporate limits of the City of Owensboro, but extends throughout a large portion of Daviess County, in which said City is located, and subscribers located inside of the corporate limits have the right to and do converse freely and for the same monthly charge—all patrons connected with the exchange outside of the corporate limits of said city, and likewise the subscribers outside are connected with, and converse with, the subscribers living in the corporate limits."

4. "The exchange in the beginning was to a very great extent experimental, was not regarded as of much advantage or convenience by the citizens of said city, and the number of subscribers, were few, but from time to time additional subscribers have been obtained until January 1, 1909, when the number of subscribers connected to said exchange, having the right to talk freely and at all times, day and night between themselves amounted to 1,137. From time to time as the number of subscribers increased your orator has of necessity been compelled to erect additional poles and string additional wires to accommodate and serve the new subscribers obtained, which is essential and necessary in conducting a telephone business and operating a telephone exchange, so that on July 1, 1908, and likewise at the present time, your orator has expended largely in excess of $100,000.00 in the construction of said exchange, and your orator charges that it could not be reproduced for a less amount at the present time; and that it has been built economically, prudently and skillfully."

5. "Your orator charges that its operations in the city
145 of Owensboro have almost from the beginning been disastrous, so that it has not in the aggregate earned as much as one per cent upon the actual cost of its property in said city, nor has it during any one year since it has been operating said plant earned as much as five per cent net upon the actual cost or value of the plant.

During the past year, to-wit, 1908, it received the following revenue:

Exchange service	$25,990.50
Proportion of tolls earned by exchange	1,403.26
Messenger	235.20
Miscellaneous	22.85
List ads	273.75
	$27,925.56

and during the same yearm it paid out in expenses the following

General:	
Salaries and wages	$951.39
Rent, light and heat	40.14
Traveling	164.84
Postage, Ptg. and Sta	6.80
Legal	1,050.70
Uncollectible	168.92
Incidental	213.44
	$3,704.06
Operating:	
Salaries and wages	$8,238.68
Rent, light and heat	971.65
Postage, prtf. & Sta	104.80
Directory	312.90
Advertising and canvassing	245.90
Messenger expenses	202.85
Incidental	311.84
	$10,388.67
Maintenance:	
Salaries and wages	$4,995.33
Rent, light and heat	390.83
Material	943.88
Traveling	1,335.54
Incidental	790.66
Damage and compensation	60.66
	$8,516.90
146 Instrument rental	$1,225.83
Insurance	261.10
Taxes	1,617.16
	$24,487.89

Your orator further states that the foregoing is the exact amount of money received from the operation of said exchange and the exact amount of money paid out by it in expense in conducting said exchange; and nothing whatever is allowed therein for depreciation of its property, which your orator charges should be seven and one-half per cent upon the actual cost of the property, less whatever amount was used during the year in re-constructing any part of the plant. From which it appears that your orator has a balance of $3,437.67 of revenue above the actual amount paid out by it, and if a fair amount for depreciation be added to the expenses, it will more than consume this balance of revenue. So that your orator charges, and it is a fact that your orator, on its present schedule of rates, is unable to earn any return whatever upon the actual cost of its plant in the city of Owensboro, Kentucky.

The schedule of rates in force in the City of Owensboro during 1908 ranged from $3.75 per month for a business telephone to $2.50 per month, depending entirely upon the character of equipment and service which the patron desired; and its residence rates ranged from $2.00 to $1.50 per month.

In August, 1908, the Common Council of the City of Owensboro adopted an ordinance in the following language:

"An Ordinance Regulating the Charges for Telephone Service in the City of Owensboro.

Whereas, there has been irregularity in the charges made by corporations or companies furnishing telephone service in the city of Owensboro, by which persons are often charged higher prices than others for the same service, and in the same locality, and

Whereas, such prices are often exhorbitant or unreasonable

Now, therefore, in order to regulate the same by establishing a uniform system of reasonable charge for said service

147 Be it ordained by the Common Council of the City of Owensboro

SECT. 1. That all companies, corporations, firms or individuals, who are operating, conducting and maintaining a telephone system in the city of Owensboro, and all companies, corporations, firms or individuals, who shall hereafter maintain, operate or conduct a telephone system or service in the City of Owensboro, shall regulate the prices or charges for such service as hereinafter provided:

SECT. 2. For each telephone in a business house or office, the charge or price shall not exceed two dollars and fifty cents ($2.50) per month, or at the rate of thirty ($30.00) dollars per year, for each telephone in a residence the charge or price therefor shall not exceed one dollar and fifty — ($1.50) per month, or at the rate of eighteen dollars ($18.00) per year; for extension desk telephones, the price or charge therefor shall not exceed one dollar ($1.00) per month, or at the rate of twelve dollars ($12.00) per year in addition to the regular price hereinbefore specified.

SECT. 3. It shall be unlawful for any corporation, company, firm or individual, furnishing telephone service within the City of Owensboro, to charge therefor an amount exceeding that fixed in this

ordinance, and any violation thereof shall be punished by a fine of not less than ten dollars ($10.00) nor more than one hundred — ($100.00); and each charge in excess of the amount so fixed shall constitute a separate offense.

SECT. 4. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECT. 5. This ordinance shall take effect from and after its passage."

This ordinance was suspended from time to time until January 1, 1909, when the same *because* effective, and "* * *

6. "Your orator charges that the rates adopted in said ordinance above set out are unreasonable, unjust, unfair and confiscatory.

Your orator further charges that if the said rates should be enforced, the revenue received during the past year would
148 be decreased more than $3,000.00 per annum, and would compel your orator to operate said exchange for the benefit and convenience of the citizens of Owensboro, Kentucky, at an actual loss, without allowing any amount whatever for depreciation."

7. "Your orator further charges that its plant has been constructed honestly, economically, and skillfully, and that its value and cost is reasonable, proper and right. Your orator further charges that it has operated said e-change honestly, prudently economically and skillfully and that the expenses cannot be reduced and were necessary and proper to be incurred; that its receipts cannot be increased without an increase in rates, and that the rates charged by it are not only not excessive, but are not sufficient to yeild to your orator a fair return upon its investment, nor are they commensurate with the value of the service rendered to your orator's patrons in the City of Owensboro, Kentucky.

Your orator further charges that the City officials before adopting said ordinance reducing its rates, made no intelligent investigation, nor did they offer your orator any fair or reasonable opportunity of showing the real facts in regard to the costs, or operating, or return from said exchange; and your orator further charges that the city officials did not know, nor did they undertake to investigate, or ascertain, what the real facts were with respect to the costs, the receipts or disbursements of the said exchange before adopting said ordinance, and your orator further charges that said officials did not have the information or knowledge sufficient or proper to enable them to determine what rates for telephone service in Owensboro were reasonable, proper or right."

And said motion coming on to be heard was argued by counsel and the Court being sufficiently advised thereof, it is considered and adjudged by the court that said motion be and the same is hereby sustained and said parts of the bill of complaint are stricken therefrom.

The defendant's plea to the complainant's bill having
149 been set for hearing and the said plea coming on to be heard, was argued by counsel and the court being sufficiently advised

thereof, it is considered and adjudged by the court that said plea be and it is hereby overruled.

And on another day of said term of said court, viz., on the 31st day of May, A. D. 1910, the following order was entered to-wit:—

The Court being now sufficiently advised of the questions arising upon the demurrer of the defendant to the bill of complaint is of opinion that if its averments are true there is equity in the bill, and upon consideration thereof it is now ordered, adjudged and decreed by the court that the said demurrer should be and accordingly it is overruled and denied.

It is further ordered that if the defendant shall be advised to answer the bill it shall do so on or before the July Rules, 1910.

150 And on another day of said term of said court, viz., on the 4th day of July, A. D. 1910, the following proceedings were had, to-wit:—

This day came the defendant, City of Owensboro, by its counsel, George W. Jolly, and R. S. Todd, and filed herein its answer to the complainant's bill of complaint against it.

The answer above referred to is as follows:—

151 In the Circuit Court of the United States for the Western District of Kentucky, Owensboro Division.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
v.
CITY OF OWENSBORO, KENTUCKY, Defendant.

Answer of the Defendant, City of Owensboro, Kentucky, to the Complainant's Bill of Complaint.

The defendant, City of Owensboro, now and at all times, saving and reserving unto itself all benefits and advantage of exception to the many errors, uncertainties, imperfections and insufficiencies in the complainant's bill of complaint contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, makes the following answer to the complainant's bill of complaint herein:

1. It denies that the ordinance set out in the complainant's bill and which was adopted in January, 1909, by the Common Council of the City of Owensboro, violates any obligation of the alleged contract between said City and the Complainant under said ordinance of said city of December, 4, 1889, or that any contract existed between complainant and said city under said ordinance of December 4, 1889, or otherwise, at the time of the adoption of said ordinance adopted in January, 1909, aforesaid, or that any contract ever existed between complainant and said city under said ordinance of December 4, 1889, or that said ordinance of January, 1909, denies to the complainant the equal protection of the law, or that it is

contrary to the provisions of the constitution of the United States, or that it violates Section 10 of Article 1 of the Constitution of the United States, or that it violates Section 1 of Article 14 of the Constitution of the United States, or that it deprives the complainant of any property without due process of law, or denies to the complainant the equal protection of the law, or that the enforcement of said ordinance will cause the complainant irreparable or any injury or damage or will destroy the complainant's property, or any of it, or deprive it of its property, or any of it, without due process of law, or otherwise, or will deny to the complainant the equal protection of the law, or that the enforcement of said ordinance will impair the obligation of any contract between the defendant, City of
152 Owensboro, and the complainant, or that if complainant's poles and wires, or either, be removed, the same can not be used to restore the plant, or that new poles or wires will have to be purchased or used for the new structure, or that thereby or otherwise there will be entailed upon the complainant the loss of the existing superstructure, or the cost of a new superstructure, in addition, or that its business will be interrupted or suspended, or that damage incapable of computation or any damage will be inflicted upon complainant, or that the injuries set out in complainant's bill, above mentioned, or any injuries, will be inflicted upon the complainant by said city of Owensboro, unless restrained or prohibited by this court, or that such alleged wrongs or alleged injuries can only be prevented under the orders or decrees of this court, or that the complainant can have no adequate relief except in this court.

2. For further answer the defendant says that the Mayor and Common Council of the City of Owensboro did not, on December 4, 1889, or at any other time, have any power or authority under the laws of the State of Kentucky, until the passage of the act of the legislature of June 14, 1893, for the government of cities of the third class to grant to telephone or telegraph companies, by ordinance or otherwise, license, easement or privilege to use the streets, alleys or public ways of the City for erection of poles or stringing wires thereon, or maintaining an exchange, or conducting or carrying on a telephone business in said City. And said Mayor and Common Council had no power or authority under the laws of said state to enact said alleged ordinance dated December 4, 1889, the same set out in the complainant's bill herein. Moreover, the defendant states that said ordinance did not confer upon the complainant any license, privilege, power or authority to erect any poles, or string any wires thereon, or establish any exchange, or offer any telephone service in the said city or to occupy the streets, alleys or public ways of said city for such purpose, or any purpose. And defendant further states that the complainant did not at any time pursuant to the alleged rights granted by the Mayor and Common Council of the City of Owensboro, either under said alleged ordinance, or otherwise, erect any poles, or string wires thereon, or at all, or establish any exchange, or offer the public any telephone service, in said City of Owensboro, or elsewhere, or at all.

153 3. The defendant for further answer to the complainant's bill states that on the 8th day of June, A. D. 1883, E. S. Babcock, Jr., Paul F. Marrs, Milo G. Kellogg, E. P. Huston, E. T. Baker, J. Compton, E. P. Copeland, Isaac T. Rhea, and Enos N. Barton, associated themselves together and constituted themselves a body corporate and politic under and by virtue of Chapter 56, of the General Statutes of the Commonwealth of Kentucky, and the acts Amendatory thereof, for the purposes and upon the terms and conditions in written articles which were signed, acknowledged and recorded in the Clerk's office of the Henderson County Court in the State of Kentucky, and a copy thereof was filed in the office of the Secretary of State for the State of Kentucky, under the name and style of the Cumberland Telephone & Telegraph Company, for the purpose of maintaining and operating telephone and telegraph lines, telephone exchanges and all such business as is usually done by telephone exchanges and district telegraph and messenger systems, which said articles are in words and figures as follows, to-wit:—

"We whose names are signed hereto hereby associate ourselves together and do hereby constitute ourselves a body corporate and politic under and by virtue of Chapter Fifty-six (56) of the General Statutes of the Commonwealth of Kentucky and the acts amendatory thereof and for the purposes and upon the terms and conditions in these articles hereinafter expressed.

ARTICLE 1. The name of the Corporators are we whose names are undersigned; the name of the corporation is the Cumberland Telephone and Telegraph Company; its principal place of business is in the city and County of Henderson, State of Kentucky.

ARTICLE 2. The General nature of the business proposed to be transacted is the erection, maintaining and operating of telephone and telegraph lines, telegraph exchanges, and all such business as is usually done by telephone exchanges and district telegraph and messenger systems.

ARTICLE 3. The amount of capital stock authorized is not less than four hundred thousand dollars and may be increased to three million dollars divided into shares of one hundred — each and is to be paid in by the subscribers upon call and twenty days' notice from the Board of Directors of said Company.

154 ARTICLE 4. The existence of said corporation commences on the eighth day of June, 1883, and terminates in twenty-five years from said date unless sooner dissolved by agreement of three-fifths in amount and a majority in number of the stockholders.

ARTICLE 5. The greatest amount of the indebtedness to which said Company shall subject itself at any time shall not exceed fifty per cent of its capital stock actually paid in.

ARTICLE 6. The affairs of said Company are to be controlled by a Board of nine directors and a President, and Vice-President to be selected by said Board of Directors from their own number. The said Board of Directors shall be stockholders of the company and shall be elected by the stockholders. The Directors elected at the first meeting of the stockholders shall be divided into three classes,

numbered, consecutively, of three members each, the term of office of the first class to expire on the day of the annual election of said Company then next ensuing, the second class one year thereafter, and the third class two years thereafter. At each annual meeting after such classification the stockholders of the company shall elect for a term of three years a number of directors equal to the number whose term expires on the days of such election and all other vacancies to be filled in accordance with the bylaws of the Corporation. Should there from any cause be a failure to elect on said day then they may be elected at any regular meeting thereafter or at any meeting of the stockholders called for that purpose, and the said Board of Directors may also employ such other officers and agents as they may deem necessary.

ARTICLE 7. The private property of the corporators and stockholders of said corporation shall be exempt from the corporate debts of said Company. Witness our hands this eighth day of June, 1883.

E. S. BABCOCK, JR.,
PAUL F. MARRS,
MILO G. KELLOGG,
E. P. HUSTON,
E. T. BAKER,
J. COMPTON,
E. P. COPELAND,
ISAAC T. RHEA,
155 ENOS. M. BARTON.

VANDERBURG COUNTY,
State of Indiana:

Personally appeared before the undersigned Notary Public in and for the County and State aforesaid duly commissioned and qualified, M. G. Kellogg, E. S. Babcock, Jr., E. P. Huston, Paul J. Marrs, and E. T. Baker, with whom I am personally acquainted, who acknowledged that they signed the foregoing instrument of writing for the purposes therein mentioned. In testimony whereof I have hereto signed my name and affixed my seal of office, in the city of Evansville, Ind., County and State aforesaid this first day of June, 1883.

[SEAL.] GEORGE S. CLIFFORD,
Notary Public, Vanderburg Co., Ind.

STATE OF TENNESSEE,
County of Davidson, ss:

Personally appeared before the undersigned Notary Public in and for the County and State aforesaid duly commissioned and qualified, J. Compton, E. P. Copeland, and Isaac T. Rhea, with whom I am personally acquainted, who acknowledged that they signed the foregoing instrument of writing for the purposes therein mentioned. In testimony whereof I have hereto signed my name and affixed my seal of office in the City of Nashville, County and State aforesaid this second day of June, 1883.

[SEAL.] WM. S. GRANGER,
Notary Public.

156 COOK COUNTY,
State of Illinois:

Personally appeared before me the undersigned Notary Public in and for the County and State aforesaid duly commissioned and qualified, Enos M. Barton, with whom I am personally acquainted, who acknowledged that he signed the foregoing instrument of writing for the purpose therein mentioned. In testimony whereof I have hereto signed my name and affixed my seal of office in the City of Chicago, in the County and State aforesaid this sixth day of June, 1883.

[SEAL.] WM. S. GRANGER,
Notary Public.

STATE OF KENTUCKY,
Henderson County, sct:

I, Geo. W. Smith, Clerk of the Henderson County Court, do certify that the foregoing Articles of Incorporation of the Cumberland Telephone and Telegraph Company was this day lodged in my office for record and the same with the foregoing certificate thereon endorsed is with this certificate truly recorded in my office. Witness my hand this 8th day of June, 1883.

GEO. W. SMITH, *C. H. C. C.*,
By THOMAAS H. BEVERLY, *D. C.*

A copy.
Attest:
L. W. POWELL,
Clerk Henderson County Court,
By D. TRAFTON, *D. C.*

On December 21, 1883, said articles were amended, whereby the stock of said corporation was increased to three Million ($3,000,000) dollars. On May 14, 1889, the said articles were further amended, whereby the board of Directors of said corporation was increased from nine members to twelve members. On February 3rd, 1896, the said corporation further amended its articles, accepting the present constitution of the Commonwealth of Kentucky, as authorized and provided by section 570 of the Kentucky Statutes.

157 On June 8, 1883, a corporation was created and organized under the laws of the State of Kentucky, under the name and style of the Great Northern Telephone & Telegraph Company, pursuant to Chapter 56 of the Kentucky Statutes, the principal place of business of said corporation being at the City of Henderson Kentucky. The capital stock was fixed at $700,000.00. Said corporation commenced business on June 8, 1883, and the period of its existance was limited to twenty five years next thereafter, the purpose of said corporation being to carry on a telephone business in the State of Kentucky and elsewhere. On December 21, 1883, the articles of said corporation were amended, whereby the capital stock was increased to $2,000,000. On September 28, 1891,

said corporation accepted the provisions of the present Constitution of Kentucky as provided by section 507 of the Kentucky Statutes.

On March 4, 1898, articles consolidating the said Cumberland Telephone and Telegraph Company and said Great Southern Telephone & Telegraph Company was entered into and adopted by the stockholders and owners of said two companies, and said two corporations became one corporation, under said articles of consolidation, under the name and style of the Cumberland Telephone & Telegraph Company. The capital stock of said corporation was fixed at $3,000,000. On March 4, 1889, the articles of incorporation of said Cumberland Telephone and Telegraph Company were amended, whereby the stock of the same was increased to $6,000,000.

By an act of the Legislature of the Commonwealth of Kentucky, Approved April 3, 1886, entitled "An Act to incorporate the Ohio Valley Telephone Company," a corporation was created with its principal place of business at the City of Louisville, for the purpose of carrying on and conducting a telephone business in the State of Kentucky and elsewhere.

On January 27, 1900, articles of consolidation were made and entered into by and between the stockholders and owners of said Ohio Valley Telephone Company and said Cumberland Telephone & Telegraph Company, whereby said corporations were consolidated under the name of the Cumberland Telephone & Telegraph Company, and the period of the duration of said corporation created by said consolidation was fixed at two hundred years,
158 and on January 9, 1903, the said articles of incorporation were further amended, whereby the capital stock of said corporation was increased to $20,000,000, and the complainant has had corporate existence under the laws of the State of Kentucky since June 8, 1883, to the present time, under said articles of incorporation and amendments thereto, as hereinbefore set out.

Copies of said articles of incorporation and amendments and consolidations are filed with and annexed to and made parts of the complainant's bill, and the parts thereof hereinbefore referred to are made parts of this answer.

4. The defendant for further answer states and charges that if the complainant acquired any right or privilege or franchise to occupy the streets of the City of Owensboro with its poles and wires, and to conduct a telephone exchange in said city, or to carry on a telephone business in said city, under the alleged ordinance of December 4, 1889, that all such rights, privileges or franchises had expired before the passage, by the Common Council of the defendant, of said ordinance of January, 1909, and that at the time of the passage of the last named ordinance there was no subsisting contract between the defendant and the complainant, and the complainant had at such time, namely, January, 1909, no right, privilege, or franchise to occupy the streets, alleys, lanes, or public places of the defendant City, or any of them, or to erect or maintain any poles, or string any wires thereon, or to conduct a telephone exchange in said city, or to carry on a telephone business in said city, and that the complainant has never acquired, at any

time, a franchise from the said city to conduct a telephone business, or to erect poles or string wires thereon, in said defendant City.

Wherefore defendant city of Owensboro, prays this Honorable Court that Complainant's bill of Complaint herein be dismissed, and that it recover its costs herein expended, and for all such other relief as it may be entitled to on final hearing.

THE CITY OF OWENSBORO, KENTUCKY,
By S. LAMBERT, *Mayor.*

159 GEORGE W. JOLLY,
R. S. TODD,
Attorneys for Defendant.

UNITED STATES OF AMERICA,
Western District of Kentucky, sct:

S. Lambert, says he is the duly elected and acting mayor of the city of Owensboro, and that he believes the statements of the foregoing answer to be true.

S. LAMBERT.

Subscribed and sworn to before me by S. Lambert, this the 2nd day of July, 1910.

[SEAL.] K. M. SWEENEY,
Notary Public, D. C.

My commission expires Jan. 16, 1912.

160 And on another day of said term of said court, viz., on the 1st day of August, 1910, the following proceedings were had, to-wit:

This day came the complainant, Cumberland Telephone & Telegraph Company, by William L. Granberry, and C. M. Finn, its attorneys, and filed its replication to the answer of the defendant herein.

The replication above referred to is as follows:

United States Circuit Court, Western District of Kentucky, at Owensboro.

CUMBERLAND TELEPHONE & TELEGRAPH CO., Complainants,
vs.
CITY OF OWENSBORO, KENTUCKY, Defendants.

Replication.

The replicant, The Cumberland Telephone & Telegraph Co., saving and reserving to itself all and all manner of advantages of exceptions which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendant, City of Owensboro, for replication thereto says that it doth and will aver,

maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it has already prayed.

WILLIAM L. GRANBERRY,
CLARENCE M. FINN,
Solicitors for Complainants.

161 And at another term of said court, viz., held for its November term 1910, continued and held, viz., on the 28th day of November, A. D. 1910, the following order was entered, to-wit:—

This day came the complainant by Wm. L. Granberry, and C. M. Finn, its counsel, Came also the defendant by R. S. Todd, and George W. Jolly, its counsel. The parties by their counsel filed their written stipulation herein, which is as follows,:—

"In this cause, in order to save the necessity of taking proof, it is stipulated as follows:

1. The Cumberland Telephone & Telegraph Company is a corporation organized under the laws of the Commonwealth of Kentucky, and a correct copy of its charter is attached to the bill as an exhibit, and may be used as evidence in this case.

2. The ordinance of December 4, 1889, as copied into the bill is a correct copy of the ordinance passed by the city of Owensboro.

3. The plaintiff erected an exchange in the City of Owensboro, and has operated same under said grant or permission continuously to the present time.

4. The City authorities of the City of Owensboro have, from time to time, strung such of its fire alarm wires authorized under said ordinance, as they so desired on the poles of the complainant company, and all such poles of complainant company as have been, or are now being used by the city to support such of its fire alarm wires as have been, or are now being carried on such poles, have been maintained by complainant company without expense to the City.

5. That the plaintiff company has furnished to the City of Owensboro, for the use of the City, free telephones, beginning with one in 1889, and gradually increasing in number to five, which the city now has and uses.

6. That the ordinance adopted by the City in January, 1909, is correctly copied into the bill.

162 7. That the complainant company has continuously from the time of its original organization to the present time operated its properties, including its plant in the City of Owensboro, Kentucky, under the provisions of the several charters attached to its bill of complaint as exhibit "A," and called "Charter of the Cumberland Telephone & Telegraph Company of Kentucky."

8. A copy of the Charter of Owensboro, Kentucky, in force during the whole of the year 1889, is hereto attached, and made a part of these stipulations.

9. It is agreed that this stipulation does not preclude the defendant from taking any proof it may desire.

This cause coming on to be heard, the complainant, Cumberland Telephone & Telegraph Company, read in its own behalf its bill of complaint filed herein January 27, 1909, together with the exhibits filed therewith January 27, 1909, same being the charter of the Cumberland Telephone & Telegraph Company of Kentucky; also its re-lication filed August 1, 1910, also the deposition of James E. Caldwell, filed herein October 11, 1910, and the agreed statement of fact stipulated and filed of record herein and a copy of the charter of Owensboro, Kentucky, in force during the year 1889, being "An Act creating a new charter for the City of Owensboro," approved March 18th, 1882 (See Acts of 1881, Vol. 1, pp. 817-856), and the defendant read in its behalf its demurrers to the complainant's bill which were filed February 9, 1909, motion filed and entered by defendant May 4, 1909, the motions which were filed by it and which were entered and sustained by the Court May 17th, 1909, the plea of defendant which was filed February 7, 1910, and the exhibits filed therewith, and the answer of the defendant to the complainant's bill, which was filed July 4, 1910. And having been argued by counsel and the Court not being sufficiently advised of the decree which is proper to be rendered herein, takes time.

The stipulation above referred to is as follows:

163 No. 227.

CUMBERLAND TELEPHONE & TELEGRAPH CO.
vs.
THE CITY OF OWENSBORO, KENTUCKY.

Pending in the United States Circuit Court at Owensboro, Kentucky.

"In this cause, in order to save the necessity of taking proof, it is stipulated as follows:

1. The Cumberland Telephone & Telegraph Company is a corporation organized under the laws of the Commonwealth of Kentucky, and a correct copy of this charter is attached to the bill as an exhibit, and may be used as evidence in this case.

2. The ordinance of December 4, 1889, as copied into the bill is a correct copy of the ordinance passed by the City of Owensboro.

3. The plaintiff erected an exchange in the City of Owensboro, and has operated same under said grant or permission continuously to the present time.

4. The City authorities of the City of Owensboro have, from time to time, strung such of its fire alarm wires authorized under said ordinance, as they so desired on the poles of the complainant company, and all such poles of complainant company as have been, or are now being used by the city to support such of its fire alarm

wires as have been, or are now being carried on such poles, have been maintained by complainant company without expense to the City.

5. That the plaintiff company has furnished to the City of Owensboro, for the use of the City, free telephones, beginning with one in 1889, and gradually increasing in number to five, which the city now has and uses.

6. That the ordinance adopted by the City in January, 1909, is correctly copied into the bill.

164 7. That the complainant company has continuously from the time of its original organization to the present time operated its properties, including its plant in the City of Owensboro, Kentucky, under the provisions of the several charters attached to its bill of complaint as exhibit "A," and called "Charter of the Cumberland Telephone & Telegraph Company of Kentucky."

8. A copy of the Charter of Owensboro, Kentucky, in force during the whole of the year 1889 is hereto attached, and made a part of these stipulations.

9. It is agreed that this stipulation does not preclude the defendant from taking any proof it may desire.

September 30th, A. D. 1910.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
By WILLIAM L. GRANBERRY AND C. M. FINN,
Counsel.

CITY OF OWENSBORO, KENTUCKY,
By R. S. TODD, GEORGE W. JOLLY,
Counsel.

165 The deposition of James E. Caldwell, filed on October 11th, 1910, is as follows:—

No. 227.

CUMBERLAND TELEPHONE & TELEGRAPH CO.
vs.
CITY OF OWENSBORO, KENTUCKY.

Pending in the United States Circuit Court at Owensboro, Kentucky.

Deposition of JAMES E. CALDWELL, taken by consent at Nashville, Tennessee, September 15, 1910, to be used as evidence on behalf of plaintiff, caption certificate and formalities being waived, and when the deposition is written out and signed by the witness it may be forwarded to the Clerk to be filed as evidence:

Q. Are you the President of the Plaintiff Company?
A. I am.
Q. How long have you been President?
A. For nearly 21 years now.
Q. Have you had much experience in the telephone business?

A. Yes sir, I have had perhaps as much as any other one man in this business.

Q. Have you given it your entire time and attention for the past few years?

A. Yes sir, I have given it a great deal of attention as an officer, as well as a stockholder and director in the Company.

Q. In the event the plaintiff Company should be required to take down its plant in the City of Owensboro, what would be the effect so far as the value of the property is concerned?

A. I suppose it would be worth somewhere about 15% or 20% of its present value.

Q. What effect would that have on that part of the exchange lying outside of the corporation limits of the city?

A. It would render it practically valueless; without connection with the City that part of the property would be of no value whatever.

Q. What salvage value is there in taking down a telephone plant?

166 A. That is what I meant to convey when I said the property would be worth somewhere about 15% or 20%; I meant there would be that much salvage.

Cross examination waived.

JAMES E. CALDWELL.

Sworn to and subscribed before me this September 15th, 1910.

[SEAL.] J. W. SYMMES, *Notary Public.*

167 And on another day of said term of said court, viz., on the 29th day of December, A. D. 1910, the following order was entered, to-wit:—

This cause having heretofore, to-wit, on the 28th day of November, 1910, been argued by counsel and submitted, and the Court being now sufficiently advised, and finding that the complainant Cumberland Telephone and Telegraph Company has by the testimony sustained the material averments of its bill of complaint, notwithstanding such denials thereof as are made in the answer, it is *not* thereupon ordered, adjudged and decreed by the Court as follows, namely:—

First. That the right of the said complainant to conduct a telephone and telegraph business in the City of Owensboro, Kentucky, as claimed in the bill of Complaint, is declared and sustained.

Second. That the grant by the said city to the complainant of the right to erect and maintain its poles and wires in the streets, alleys and public ways of said city constituted, a valid and it is now a subsisting contract between said parties.

Third. That the ordinance enacted by the legislative body of said city in January, 1909, and complained of in said bill, namely, "an ordinance requiring the Cumberland Telephone and Telegraph Company to remove its poles and wires from the streets in the City," is invalid and void as being in violation of the Constitution of the United States.

Fourth. That the defendant, The City of Owensboro, Kentucky, its officers, attorneys, agents and employees of every character and each and every of them be and they are each and all strictly enjoined and restrained, during the continuance and existence of the contract herein sustained and adjudged to be in force, from in any manner interfering with the right of the complainant, Cumberland Telephone and Telegraph Company, to erect and maintain, or with its erecting and maintaining, its poles and wires in the streets, alleys and public ways in the said city of Owensboro, Kentucky, and
168 from in any manner interfering with or disturbing the said complainant in the exercise of its rights in that regard under said grant and contract and from in any manner interfering with or seeking to impair the obligation of said contract made by the said city with the said complainant and described or relied upon in the bill of complaint herein in respect to erecting and maintaining its poles and wires in the said streets, alleys and public ways of the said city.

Fifth. That the complainant, Cumberland Telephone & Telegraph Company, do have and recover of the defendant, the City of Owensboro, Kentucky, its costs herein expended, as the same may be lawfully taxed by the Clerk, and may have execution therefor; and

Sixth. That control of this cause be and it is retained by the court for the purpose, so far as it may be necessary or proper, of enforcing obedience to the injunction herein granted and adjudged and so far as it may be necessary for the punishment or disobedience or contempt of the same.

169 And on another day of said term of said court, to-wit, on the 6th day of February, A. D. 1911, the following order was entered, to-wit:—

Now comes said defendant, City of Owensboro, Kentucky, by its said solicitors, George W. Jolly, and tendered and moved to file a petition for an appeal from the decree herein to the Supreme Court of United States. Also at the same time tendered and moved to file an assignment of errors and a bond in the penal sum of Five Hundred ($500.00) Dollars. And the Court having considered said motion it is ordered that said petition and assignment of errors be filed, and appeal is allowed to the Supreme Court of the United States upon the execution of a bond in the penalty of Five Hundred ($500.00) Dollars constituted according to law. Thereupon, the defendant, City of Owensboro, Kentucky, tendered said bond with S. Lambert, J. W. Richardson, and J. G. Burch as Surety which bond is approved by the Court and ordered to be filed.

The petition for appeal above referred to is as follows:—

170 In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, Owensboro Division, *sct:*

No. 227.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
Complainant,
vs.
THE CITY OF OWENSBORO, KENTUCKY, Defendant.

Petition for Appeal.

The defendant, The City of Owensboro, Kentucky, conceiving itself aggreived by the decree made and entered in the above entitled cause on the 29th day of December, A. D. 1910, does hereby appeal from said orders and decrees to the Supreme Court of the United States for the reasons and on the grounds set forth and specified in the Assignment of Errors which is herewith filed, and said city prays this appeal may be allowed and that a complete transcript of the entire record, proceedings and papers upon which said orders, judgments and decrees were made, duly authenticated, may be sent to the said Supreme Court of the United States.

GEORGE W. JOLLY,
ROBERT S. TODD,
Attorneys for the City of Owensboro, Kentucky.

The Assignment of Errors above referred to is as follows:

171 In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, Owensboro Division, *sct:*

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
Complainant,
v.
THE CITY OF OWENSBORO, KENTUCKY, Defendant.

Assignment of Errors.

And now on this 6th day of February, A. D. 1911, came the defendant, the City of Owensboro, Kentucky, by its solicitors, Robert S. Todd and George W. Jolly, in the above entitled cause and says that the decrees, judgments and orders made, entered and rendered in said cause are erroneous and against the just rights of said defendant city and contrary to law, for the following reasons, to-wit:

First. Because the bill does not state a cause of action in favor of complainant against the defendant and on complainant's own showing, there being no equity in the bill and complainant is not entitled to the relief prayed for, or to any relief against defendant, and said

bill should have been dismissed, and the Circuit Court erred in not dismissing the same with costs.

Second. Because all privileges or rights to occupy the streets of the defendant city, granted to complainant by the ordinance dated December 4, 1889, expired or ceased to exist when the complainant company entered into articles of consolidation with another corporation, namely, the Great Southern Telephone & Telegraph Company, on the 4th day of March, 1898, for the reason that under the laws of the State of Kentucky (Kentucky Stats. Secs. 555 and 556) said consolidating corporations ceased to exist under their former charters,
and the consolidated corporations became thereafter a single
172 new corporation.

Or, if said grant under said ordinance of December 4, 1889, did not expire at the time of said consolidation with said Great Southern Telephone and Telegraph Company, said grant expired at the date of the consolidation of said Cumberland Telephone and Telegraph Company with the Ohio Valley Telephone Company, which took pleace on the 27th day of January, 1900, at which time said consolidating corporations ceased to exist, and became thereafter a single and new corporation under the said statutes of the State of Kentucky.

Third. Because, if said license or grant by said defendant, City of Owensboro, under said ordinance of December 3, 1889, to said Cumberland Telephone and Telegraph Company to occupy the streets, etc., of the city, did not cease at the dates, or either of them, of said consolidations, above mentioned, said grant did cease after the expiration of the period of twenty-five years from the date of the incorporation of said company under its Articles of Incorporation dated June 8, 1883, namely, on the 9th day of June, 1908, the corporate existance of said company being limited by its articles to the period of twenty-five years from the date of its original Articles of Incorporation, namely, twenty-five years from June 8th, 1883. The said grant by said city to said company under said ordinance of date December 4, 1889, to occupy, etc. the streets of the city, expired and ceased at the dates of said consolidations, or if not at those dates, or either of them, then said grant expires and ceased on said June 9, 1908, the date to which the corporate existence of the company was limited by its original Articles of Incorporation, dated June 8th, 1883.

Fourth. Because under the laws of the State of Kentucky, in force at the date of the adoption of the Articles of incorporation of the complainant company, June 8th, 1883, and which laws have been continuously in force since said date, all charters and grants of or to corporations, and amendments thereof, enacted or granted since
February 14, 1856, and all other statutes, were subject to
173 amendment or repeal at the will of the legislature, unless a
contrary intent was therin plainly expressed; and under section ten of the charter of the City of Owensboro, in force at the time the said ordinance of December 4, 1889, granting complainant the privilege or right of occupying the streets, etc., was adopted, it was therein expressly provided that all ordinances passed by the

Common Council of said city should be subject to amendment and repeal; and under said laws the said ordinance of December 4, 1889, was subject to amendment and repeal, and the ordinance of January 1909, requiring complainant to remove its poles and wires from the streets of the city, was and is a valid ordinance and a proper exercise of the reserved power of the Common Council to amend or repeal all ordinances.

Fifth. Because there was not under the Charter of the City of Owensboro in force December 4, 1889, or under the laws of the State of Kentucky, any power or authority in the Common Council of said city to make or grant any perpetual or irrevocable right or license or privilege to complainant, or any person, or corporation, to occupy the streets of the city, with poles or wires for telephone or telegraph purposes, or any purpose, or conduct a telephone or telegraph business in said city, and the court erred in adjudging that there was such power, or that there is now a valid or subsisting contract between complainant and defendant city to erect or maintain its poles and wires in the streets, alleys and public ways of said city, or that the grant by the said defendant city to the complainant of the right or privilege to erect and maintain its poles and wires in the streets, alleys and public ways of said city constituted a valid contract between said city and the complainant company.

Sixth. Because the court erred in adjudging that the complainant company has now any right to conduct a telephone and telegraph business in the city of Owensboro, Kentucky, as claimed in its bill of complaint, or otherwise.

Seventh. Because the court erred in adjudging that the ordinance enacted by the legislative body of the defendant
174 city in January, 1909, and complained of in the complainant's bill namely, "An ordinance requiring the Cumberland Telephone and Telegraph Company to remove its poles and wires from the Streets in the city," is invalid or void, or is in violation of the constitution of the United States.

Eighth. Because the court erred in adjudging that the defendant, City of Owensboro, Kentucky, its officers, attorneys, agents, and employés of every character, and each and every one of them, be enjoined or restrained from in anny manner interfering with the right of the complainant to erect or maintain, or with its erecting or maintaining its poles and wires in the streets, alleys and public ways in the said City of Owensboro, or from in any manner interfering with or disturbing the complainant in the exercise of its alleged rights in that regard under said grant or alleged contract, or from in any manner interfering with or seeking to impair the obligation of said alleged contract made by the City with complainant, and described or relied upon in the bill herein in respect to erecting and maintaining its poles and wires in the said streets, alleys or public ways of the said city, or in decreasing any injunction herein against the defendant, City of Owensboro, or any of its officers, attorneys or agents or employés.

Ninth. Because of the plea in bar made by defendant, herein, was a good and sufficient plea, and the court erred in overruling said plea and adjudging it insufficient, and in sustaining a demurrer

Tenth. Because the decree of the Circuit Court herein is contrary to law and is not supported by the evidence.

Wherefore, the defendant, City of Owensboro, prays that said decree and judgment be reversed.

THE CITY OF OWENSBORO, KENTUCKY,
By ROBERT S. TODD,
GEORGE W. JOLLY, *Solicitors.*

175 The bond above referred to is as follows:—

In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, Owensboro Division, *act:*

No. 227.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
v.
THE CITY OF OWENSBORO, KENTUCKY, Defendant.

Bond.

Know all men by these presents, that we, the City of Owensboro, Kentucky, as principal, and S. Lambert, J. W. Richardson, and J. G. Burch, as sureties, are held and firmly bound unto the complainant, the Cumberland Telephone and Telegraph Company, in the just and fully sum of five hundred dollars to be paid to complainant, the said Cumberland Telephone and Telegraph Company, to which payment well and truly to be made, we bind ourselves, jointly and severally by these presents.

Sealed with our seals and dated this 6th day of February, 1911.

Whereas, lately in the Circuit Court of the United States for the Western District of Kentucky, in a suit in equity depending in said court, between the Cumberland Telephone and Telegraph Company, complainant, against the City of Owensboro, Kentucky, defendant, — having been granted an appeal from the decree in said suit, and a citation directed to said Cumberland Telephone and Telegraph Company citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, D. C.

176 Now, the condition of the above obligation is such, that if the said City of Owensboro, Kentucky shall prosecute said appeal to effect and answer all costs, if it shall fail to make said plea good, then the above obligation shall be void, else to remain in full force and virtue.

THE CITY OF OWENSBORO, KENTUCKY,
By S. LAMBERT, *Mayor.*
S. LAMBERT. [SEAL.]
J. W. RICHARDSON. [SEAL.]
J. G. BURCH. [SEAL.]

Sealed and delivered in presence of
M. E. DUNN,
Deputy Clerk.

177 In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, Owensboro Division, *set:*

No. 227.

THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF OWENSBORO, KENTUCKY, Defendant.

Affidavit.

Each of the undersigned, S. Lambert, J. W. Richardson and J. G. Burch, states that he is a citizen and resident of the City of Owensboror, Daviess County, Kentucky; that he is the owner of property in said city subject to execution of the value of more than five hundred ($500.00) dollars over and above all his debts and liabilities, and that he has signed the appeal bond of the defendant, City of Owensboro, executed by it herein, and that his signature appearing thereto is genuine.

S. LAMBERT.
J. W. RICHARDSON.
J. G. BURCH.

Subscribed and sworn to before me by S. Lambert, J. W. Richardson and J. G. Burch, this 3rd day of February, 1911.

M. E. DUNN,
Deputy Clerk.

178 WESTERN DISTRICT OF KENTUCKY, *ss:*

I, A. G. Ronald, Clerk of the Circuit Court of the United States for the Western District of Kentucky, Owensboro Division, at Owensboro, do hereby certify that the foregoing 177 pages contain a true and correct transcript of the record and proceedings had in the case of the Cumberland Telephone & Telegraph Company against City of Owensboro, Kentucky, Number 227, as appears from the files and records in my said office.

Witness my hand and seal of said Court this 2nd day of March, A. D. 1911.

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

A. G. RONALD,
Clerk United States Circuit Court, Western District of Kentucky, Owensboro Division.

Endorsed on cover: File No. 22,569. W. Kentucky C. C. U. S. Term No. 948. City of Owensboro, appellant, vs. The Cumberland Telephone & Telegraph Company. Filed March 6th, 1911. File No. 22,569.

SUBJECT INDEX

1. Statement of the facts set out in bill and exhibits with reference to pages of transcript; demurrers and motions for want of equity, and statement of facts pleaded in bar ..... 1 to 11

2. Assignment of Errors ..... 11 to 15

3. Reference to the copy of bill as it remained after the several parts were stricken out by the court: Appendix A ..... 15, and 46 to 52

4. Brief of the points discussed in support of appellant's contention that the ordinance granting the privilege of occupying the streets of the city, was valid only during the corporate life of the grantee (the appellee) and that this expired with the consolidations, or, at the time its original charter expired, together with the authorities cited alphabetically under the different heads ..... 15 to 18

5. Brief of the points discussed in support of the plea in bar, II ..... 18 and 19

I. Argument in support of the contention the grant, made by ordinance of date December 4, 1889, expired, when appellee consolidate with other corporations, or if not then, that it expired when the period for which the corporation was originally organized expired, that is on June 9, 1909, the corporation having been organized June 8, 1883, for 25 years, and that the ordinance of January, 1909, requiring appellee to remove its poles from the streets or procure a franchise from the city to longer occupy them was valid ..... 19 to 37

II. Argument in support of the plea in bar; that judgment of court of competent jurisdiction, in previous litigation between the same parties involving same sub-

ject matter fixes forever the matters involved in the suit; that a judgment regularly dismissing the plaintiff's suit without qualification is a judgment on the merits; that the opinion of judge giving reasons for the judgment is no part of the judgment itself and cannot be used to modify it ..... 37 to 45

III. List of cases referred to, alphabetically arranged, with references to pages of brief where cited, **printed in heavy type.** Also references to authors, constitutional provisions, statutes and ordinances:

Baker v. Cummings, 181 U. S. 117, 124, **Cited 18, 39.**

Birmingham Street Ry. Co. v. Birmingham, 79 Ala. 465, 58 A. R. 615, **Cited 15, 17, 31.**

Boise City A. W. Co. v. Boise City, 123 F. R. 232, **Cited 15, 30.**

City of Louisville v. Cumberland T. & T. Co., 224 U. S. 649, **Cited 36.**

City of Owensboro v. Cumberland T. & T. Co., 174 F. R. 752, **Cited 16, 30.**

Charles River Bridge v. Warren Bridge, 11 Peters 420, **Cited 18.**

Case v. Beauregard, 101 U. S. 692, **Cited 19, 39.**

Coffey v. U. S. 116 U. S. 436, **Cited 18, 39.**

Detroit Citizens St. Ry. Co. v. Detroit Ry., 171 U. S. 48, **Cited 16, 17 31.**

DesMoines Gas Co. v. DesMoines, 44 Iowa 508, **Cited 16, 32.**

Durant v. Essex Co., 7 Wallace 109, **Cited 19, 39.**

Davis v. McCorkle, 14 Bush 754, **Cited 18, 45.**

Deposit Bank v. Daviess County, 102 Ky. 174, **Cited 35.**

Fertilizing Co. v. Hyde Park, 97 U. S. 666, **Cited 18, 30.**

Frances v. Wood, 81 Ky. 22, **Cited 18, 45.**

Greenwood v. Freight Co., 105 U. S. 13, **Cited 18, 33, 34, 35.**

Griffin v. Kentucky Ins. o., 3 Bush 592, **Cited 16, 33.**

Hager, Auditor, v. Walker, 128 Ky. 1, **Cited 16.**

Hopkins v. Swansea, 4 M. & W. 621, **Cited 16, 32.**

Hanley v. Donoghue, 116 U. S. 6, **Cited 18, 41.**

Hardwick v. Young, 110 Ky. 504, **Cited 18, 45.**

Henderson v. Henderson, 3 Hare 115, **Cited 18, 45.**

Knoxville Water Co. v. Knoxville, 200 U. S. 33, **Cited 18, 30.**

Logansport Ry. Co. v. Logansport, 114 F. R. 688, **Cited 16, 17, 31.**

Louisville City Ry. Co. v. Louisville, 8 Bush 420, **Cited 17, 34.**

Lyon v. Perin Mfg. Co., 125 U. S. 700, **Cited 18, 41.**

Martin v. Evans, 85 Md. 8; 60 A. S. R. 297, 36 L. R. A. 220; **Cited 18, 41.**

Minturn v. Larue, 23 Howard 43, 50, **Cited 18, 30.**

Mercantile Trust Co. v. Denver, 161 F. R. 769, 771, **Cited 16, 30.**

Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666, **Cited 18, 30.**

Oregon Railway v. Oregonian Railway, 130 U. S. 26, **Cited 16, 18, 30.**

Presbyterian Church v. New York, 5 Cowen 532, **Cited 17, 33.**

Rock Island v. Central Union T. Co., 132 Ill. App. 248, **Cited 16, 30.**

Rockwith v. State Road Bridge Co., 145 Mich. 455, **Cited 16, 30.**

Rex v. Duchess of Kingston, 20 Howell's St. Tr. 355, **Cited 18, 40.**

St. Clair Co. Turnpike Co. v. Illinois, 96 U. S. 63, **Cited 16, 21, 28.**

Southern Bell Tel. Co. v. Richmond, 98 F. R. 672, 103 F. R. 31, **Cited 17, 34, 35.**

Snell v. Chicago, 133 Ill. 413, 432, **Cited 16, 30.**

State v. Cape Girardeau & J. G. R. Co., 207 Mo. 85, **Cited 16, 30.**

State v. Scott Co. M. R. Co., 207 Mo. 54, **Cited 16, 30.**

Stuyvesant v. New York, 7 Cowen 349, **Cited 17, 33.**
Shields v. Ohio, 95 U. S. 319, **Cited 15.**
Southern Pacif. R. R. Co. v. U. S., 1, 48, 50, **Cited, 39.**
Savings Bank v. Owensboro, 173 U. S. 653, **Cited 33.**
Toll Roads v. People, 21 Col. 429, 37 L. R. A. 711, **Cited 16, 30.**
Thomas v. Railroad Co., 101, U. S. 71, **Cited 18, 30.**
Vanderbilt v. Adams, 7 Cowen 349, **Cited 17, 33.**
Virginia Canon T. R. Co. v. People, 22 Col. 249, **Cited 16, 30.**
Wyandotte E. L. & P. C. v. Wyandotte, 124 Mich. 43, 47, **Cited 16, 29.**

AUTHORS

Bigelow on Estoppel, 72, 73, 152, **Cited 18, 43.**
Black on Judgments, secs. 720, 731, **Cited 19, 43.**
Cooley's Const. Lim. (5 Ed.), top pages, 240, 241, 245, 573, **Cited 17, 32.**
Cyc. Vol. 23, page 1142, note 57, **Cited 17, 43.**
Dillon Mun. Corp., secs. 245, 573, **Cited 32, 33.**
Freeman on Judgments, sec. 249, 270, **Cited 19, 43.**
Van Fleet on Former Adjudication, secs. 37, 40, **Cited 18, 43.**

CONSTITUTION AND STATUTES

Constitution of Kentucky, secs. 3, 163, 190, **Cited 4, 32, 57.**
Charter of Owensboro of 1882, sec. 10, sub-sec. 27, **Cited 6, 7, 31.**
Kentucky Stats. (1909 Ed.), secs. 555, 556, 560, 1987, 3290, **Cited 7, 8, 31, 53, 54, 55.**

ORDINANCES OF CITY OF OWENSBORO

Grant to Appellee, Dec. 4, 1889, 6, 47, **Cited 35, 38.**
Repealing Ordinance, January, 1909, 49, **Cited 31, 32.**

No. 244

Supreme Court of the United States

OCTOBER TERM 1912

City of Owensboro, - - - - - Appellant.

V.

Cumberland Telephone and Telegraph Company, - - - - - - Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

Statement, Brief and Argument for Appellant.

MAY IT PLEASE THE COURT:

STATEMENT

The appellee filed a bill against the appellant on the 9th day of January, 1909, in which it sought to enjoin the appellant from putting into force *two* ordinances which had been adopted by its Common Council, one passed in August, 1908, regulating the charges for telephone service, and the other, passed in

January, 1909, requiring the appellee to remove its poles and wires from the streets of the appellant.

To that bill a demurrer was sustained for multifariousness, and thereupon the appellee amended its bill and omitted therefrom, in the language of the amendment, "all the allegations and averments of the original bill which are solely applicable to the ordinance averred in the bill, adopted by the Common Council of Owensboro in January, 1909, entitled 'An Ordinance requiring the Cumberland Telephone & Telegraph Company to remove its poles and wires from the streets of the city.'" A copy of this ordinance is printed in the Transcript of the Record, page 8.

Thereafter an interlocutory order was made enjoining the appellant from putting in force the ordinance of August, 1908, regulating the charges for telephone service in the City of Owensboro. From this order the appellant appealed to the Circuit Court of Appeals, and that court, in its opinion delivered by Judge Lurton, affirmed the action of the Circuit Court in granting the preliminary injunction. City of Owensboro v. Cumberland Telephone & Telegraph Co., 174 Fed. Rep. 739.

Immediately after the demurrer to that bill was sustained the appellee filed its bill in the present case, being, in form, substantially the same as the former bill, except it prays an injunction against the ordinance requiring removal of its poles. (Transcript, page 8.)

To this bill the appellant filed demurrers on the ground of multifariousness and on the ground of want of equity in the bill and because it appears on the face of the bill that the complainant is not entitled to any relief.

The demurrer for multifariousness was withdrawn (Tran-

script, page 54) and in lieu thereof, a motion was made to strike from the bill certain designated parts thereof as irrelevant and immaterial (Transcript, page 103), and, on the hearing of the motion it was sustained and the immaterial parts of the bill, relating to rates, were stricken out. (Transcript, page 107.)

The appellant also filed a demurrer to the bill on the ground that complainant states no cause of action; that the corporate life of the appellee had expired before the ordinance complained of was adopted, that its corporate existence was limited by its charter to twenty-five years from the date of its charter, June 8, 1883, and expired on June 9, 1908 (1898 misprint). The appellant demurred and also moved to dismiss the bill for want of equity. (Transcript, pages 100, 102, 107 and 108.)

The appellant also filed a plea in bar (Transcript pp. 59 to 99), and this plea was overruled. (Transcript, pp. 107-108). The appellant then filed an answer (Transcript, pp. 108-114), to which a replication was filed. (Transcript, p. 114.)

The ordinance of January, 1909, required the appellee, within a reasonable time after its passage, to remove from the streets of the City of Owensboro its poles and wires theretofore placed in the streets of said city, and repealed all ordinances in conflict with it. (Transcript, p. 8.)

There is filed with the bill and as part of it, as an exhibit, marked "A," a copy of the charters and amendments thereto, of the Cumberland Telephone & Telegraph Company, from which it appears that the Cumberland Telephone & Telegraph Company filed articles of incorporation under the provisions of Chapter 56 of the Kentucky Statutes, on June 8, 1883, by which it was incorporated for the purpose of carrying on a telephone business, and that the existence of the company was

limited to the period of twenty-five years from June 8, 1883, the date on which the articles were filed. (Transcript, pp. 11 to 50.)

Section 4 of these articles reads as follows:

> "The existence of said corporation commences on the 8th day of June, 1883, and terminates twenty-five years from said date unless sooner dissolved by agreement of three-fifths in amount and a majority in number of the stockholders."

These Articles were acknowledged, filed and recorded in the office of the Clerk of the Henderson County Court, in Henderson County, Kentucky.

On December 21, 1883, and May 14, 1889, respectively, they were amended increasing the capital stock of the company and the number of its Board of Directors.

On February 3, 1896, an article was adopted accepting the new Constitution of Kentucky as provided by Section 190 of the Constitution, reading as follows:

> "Sec. 190. No corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this Constitution."

And the Kentucky Statutes (Carroll), Sec. 570, which is as follows:

> "Sec. 570. No law shall be passed for the benefit of, or in the interest of, any corporation heretofore created or organized by or under the laws of this State or any other

State; nor shall any corporation avail itself of the provisions of this chapter, unless such corporation shall have previously, by resolution adopted by its Board of Directors and filed in the office of Secretary of this State, accepted the provisions of the Constitution of this State; and such resolution, or a certified copy thereof, shall be evidence for and against such corporation." (Transcript, pp. 17-18.)

It also appears that on the same date of the organization of the Cumberland Telephone & Telegraph Company, another telephone company was organized pursuant to the provisions of chapter 56 of the Kentucky Statutes, under the name of the "Great Southern Telephone & Telegraph Co.," and that the period of its existence was limited to twenty-five years from the date of its articles, June 8, 1883; that the charter of this company was amended June 30, 1884, increasing its capital stock, and was further amended September 28, 1891, by which amendment it accepted the provisions of the present Constitution of the State of Kentucky. (Transcript, pp. 18, 22.)

On March 4, 1898, articles consolidating the two above-mentioned corporations were adopted and they thereby became one corporation under the name of the Cumberland Telephone & Telegraph Co. These articles of incorporation contain various provisions not necessary to be mentioned. (Transcript, pp. 22-26.)

On April 3, 1886, the Legislature of Kentucky passed an Act incorporating "The Ohio Valley Telephone Co.," ~~which Act was accepted January 22, 1900~~. (See Acts 1885-6, p. 1174.) This corporation was created for the purpose of carrying on a telephone business with its principal place of business at Louisville. (Transcript, pp. 37-39.)

On January 27, 1900, articles were adopted consolidating the Cumberland Telephone & Telegraph Co. and the Ohio Valley Telephone Co. under the name of the Cumberland Telephone & Telegraph Company. The term of the corporate existence of this company was fixed at two hundred years, and on January 9, 1903, the charter was amended increasing the capital stock to twenty millions of dollars. (Transcript, pp. 40-42.)

On December 4, 1889, an ordinance was passed by the Common Council of the City of Owensboro providing, in the language of the ordinance, as follows:

> "That the Cumberland Telephone Company, its successors and assigns, is authorized and hereby granted the right to erect and maintain upon the public streets and alleys of said city any number of telephone poles of proper size, straight and shaved smooth, set plumb and set erect, and any number of wires thereon with the right to connect such wires with the building where the telephone stations are established, provided that such poles shall be located and kept so as not to interfere with the travel upon said streets or alleys or the substantial use thereof by the inhabitants of said city." (Transcript, pp. 3-4.)

On December 4, 1889, the date of the passage of the ordinance just referred to, the City of Owensboro was governed by the provisions of an Act of the Legislature of Kentucky, entitled "An Act creating a new charter for the City of Owensboro," approved March 18, 1882. (See Acts of 1881, Vol. 1, pp. 817-856.)

Section 10 of this charter reads as follows:

> "The Common Council shall have control of the finances and all property, real and personal, belonging to

the city, and shall have full power to make, publish, amend and repeal all ordinances for the following purposes, to-wit:"

Then follow fifty-seven sub-sections relating to the legislative powers conferred.

The 27th sub-section reads as follows:

> "To regulate the streets, alleys and side-walks, and all repairs thereof. * * *"

Under these provisions the Circuit Court of Appeals, Judge Lurton rendering the opinion, held in the first case that the Common Council of the City of Owensboro had power to authorize the telephone company to erect its poles and wires in the streets of the city. City of Owensboro v. Cumberland Telephone & Telegraph Company, *supra*. (174 F. R. 739.)

Among the general provisions of the corporation laws of the State of Kentucky, adopted since the new Constitution went into effect, there are two provisions which are deemed material in this controversy.

The first is contained in Section 555, Kentucky Statutes, and is as follows:

> "Any two or more corporations organized under this chapter, or the laws of this or any other State, may consolidate into a single corporation * * *" (See Appendix B.)

Then follow provisions for making such consolidation by agreement in writing.

The second provision is found in section 556 of the Statutes, and reads as follows:

"When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporation are required to be, the separate existence of the constituent corporations shall cease and the consolidated corporations shall become a single corporation in accordance with the said agreement and subject to all the provisions of this charter and other laws relating to it, and shall be vested with all the rights, privileges, franchises, exemptions, property, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities."

Then follows a proviso relating to taxes to be paid. (See Appendix B.)

By section 560 of the Statutes it is provided that:

"Any liability of corporations, or the stockholders or officers thereof, or the rights or remedies of the creditors thereof, or of persons doing or transacting business with the corporations, shall not in any way be lessened or impaired by the sale thereof, or by the increase or decrease in the capital stock of any corporation, or by the consolidation of two or more corporations, or by any change or amendment in the articles of incorporation."

As above stated the demurrer to the bill for multifariousness was withdrawn, and, in lieu thereof, a motion was made to strike out of the bill all parts thereof relating to rates for telephone service, as irrelevant, immaterial, etc., and that motion was sustained. (Transcript, pp. 103, 104, 105, 106 and 107.)

The demurrers to the bill for lack of equity, and the motion made to dismiss the bill for lack of equity, were overruled. (Transcript, pp. 99, 100, 102 and 108.)

The appellant city also filed a plea in bar. (Transcript,

p. 54). It appears in the transcript on pages 59 to 73 and the exhibits filed therewith on pages 74 to 99.

This plea alleges, in substance, that on November 13, 1900, the Cumberland Telephone & Telegraph Co. commenced a suit in the Daviess Circuit Court, State of Kentucky, against the city of Owensboro, (and the Westinghouse, Church Kerr & Co. and one Scott, who were at the time employed by the city and engaged in the erection of an electric light plant for the city), wherein it was alleged in substance, in the petition, that the plaintiff was a corporation created under the laws of Kentucky, with power to operate a telephone system, sue and be sued, contract and be contracted with, etc., and that on December 4, 1889, said city by an ordinance had granted to it the right, privilege and franchise to enter upon the streets of the city and maintain and operate telephones therein perpetually, and that the plaintiff had accepted the grant and constructed telephone lines thereunder in the streets of said city of Owensboro and connected the same with the adjacent towns and cities of the State of Kentucky, Tennessee, Alabama, Mississippi, Indiana, Illinois, Ohio, West Virginia, District of Columbia, Pennsylvania and New York, and with the principal cities of the United States, and had done all this by virtue of the grant of the ordinance above mentioned of December 4, 1889; and that it was authorized by said ordinance of December 4, 1889, to erect its poles and lines on both sides of the streets of the city, and that in consideration of the grant it would furnish telephone service to the city for its police and fire departments, etc.; that it had performed this service, and that it had expended large sums of money in the construction of its telephone system; and that generally it had complied with the said ordinance and had

constructed wires on the various streets mentioned in said city, and that the defendant city and the Church Kerr Company were unlawfully erecting poles and wires for an electric light system, and were proceeding in violation of said ordinance, to the great damage of plaintiff, to erect wires with heavy voltage thereon and place them among the telephone wires of the plaintiff, and that it was doing this in violation of the laws of the State and of the United States, inflicting irreparable damage, and praying an injunction against the city to prevent these unlawful acts on its part. It alleges that upon the filing of this suit process was issued and served upon the defendant, that the plaintiff obtained a temporary restraining order against the defendant; that on November 19, 1900, the defendant city filed a separate answer denying that under the ordinance of December 4, 1889, or at any time the city had granted to the plaintiff any privilege or franchise to enter upon the streets or that the plaintiff had any right to occupy any of the streets of the city either perpetually or for any time, or that it had accepted such grant or had done anything thereunder, or had constructed any telephone system thereunder, or that the electric light system which the city was constructing would in anywise interfere with the wires of the plaintiff, and denying every material allegation contained in the petition. It also alleges that the city further answered pleading the provisions of the ordinance of December 4, 1889, filing a copy with its answer and alleging that there was no authority in the city at the time of the passage of the ordinance, which empowered the Mayor and Council or the city to grant to the plaintiff or any telephone company any right to erect poles or string wires or carry on the business of a telephone company in the city, and alleging that the city had by an ordinance of

February 19, 1900, provided for the erection and maintainance of an electric light plant in the city for lighting the streets and public ways of the city, and that on July 25, 1900, the city had entered into a contract with its co-defendants to construct and install an electric light plant and furnish all the machinery and to do the work necessary to completing the same by December 25, 1900, and that the city was carrying into effect said ordinance, etc.; and that the city by an ordinance had required all telephone companies to lower their wires so that the electric light wires might not interfere with them, and that the plaintiff had refused to comply with said ordinance, etc.; that afterwards on January 14, 1901, the plaintiff filed a reply in said action, and the issues being completed such proceedings were had in said circuit court as that the action came on for hearing and that judgment was rendered therein *dismissing the plaintiff's suit absolutely and for the recovery of costs* by the defendant city against the plaintiff telephone company, and the defendant city filed as exhibits with said plea copies of the petition, answer, reply and judgment of the circuit court.

A temporary injunction was granted and served on the appellant, January 28, 1909. (Transcript, pp. 53, 54.)

And on final hearing the injunction against the appellant city and its agencies was made perpetual. (Transcript, pp. 118, 119.)

The assignment of errors is as follows:

> "First. Because the bill does not state a cause of action in favor of complainant against the defendant and on complainant's own showing, there being no equity in the bill and complainant is not entitled to the relief prayed for, or to any relief against defendant, and said bill should have

been dismissed, and the Circuit Court erred in not dismissing the same with costs.

"Second. Because all privileges or rights to occupy the streets of the defendant city, granted to complainant by the ordinance dated December 4, 1889, expired or ceased to exist when the complainant company entered into articles of consolidation with another corporation, namely, the Great Southern Telephone & Telegraph Company, on the 4th day of March, 1898, for the reason that under the laws of the State of Kentucky (Kentucky Stats. Secs. 555 and 556) said consolidating corporations ceased to exist under their former charters, and the consolidated corporations became thereafter a single new corporation.

"Or, if said grant under said ordinance of December 4, 1889, did not expire at the time of said consolidation with said Great Southern Telephone & Telegraph Company, said grant expired at the date of the consolidation of said Cumberland Telephone and Telegraph Company with the Ohio Valley Telephone Company, which took place on the 27th day of January, 1900, at which time said consolidating corporations ceased to exist, and became thereafter a single and new corporation under the said statutes of the State of Kentucky.

"Third. Because, if said license or grant by said defendant, City of Owensboro, under said ordinance of December 4, 1889, to said Cumberland Telephone and Telegraph Company to occupy the streets, etc., of the city, did not cease at the dates, or either of them, of said consolidations, above mentioned, said grant did cease after the expiration of the period of twenty-five years from the date of the incorporation of said company under its Articles of Incorporation dated June 8, 1883, namely, on the 9th day of June, 1908, the corporate existence of said company being limited by its articles to the period of twenty-five years from the date of its original Articles of Incorporation, namely, twenty-five years from June 8th, 1883. The said grant by said city to said company under said ordinance of date December 4, 1889, to occupy, etc., the streets of the city, expired and ceased at the dates of said

consolidations, or if not at those dates, or either of them, then said grant expired and ceased on said June 9, 1908, the date to which the corporate existence of the company was limited by its original Articles of Incorporation, dated June 8th, 1883.

"Fourth. Because under the laws of the State of Kentucky, in force at the date of the adoption of the Articles of Incorporation of the complainant company, June 8th, 1883, and which laws have been continuously in force since said date, all charters and grants of or to corporations, and amendments thereof, enacted or granted since February 14, 1856, and all other statutes, were subject to amendment or repeal at the will of the Legislature, unless a contrary intent was therein plainly expressed; and under section ten of the charter of the City of Owensboro, in force at the time the said ordinance of December 4, 1889, granting complainant the privilege or right of occupying the streets, etc., was adopted, it was therein expressly provided that all ordinances passed by the Common Council of said city should be subject to amendment and repeal; and under said laws the said ordinance of December 4, 1889, was subject to amendment and repeal, and the ordinance of January, 1909, requiring complainant to remove its poles and wires from the streets of the city, was and is a valid ordinance and a proper exercise of the reserved power of the Common Council to amend or repeal all ordinances.

"Fifth. Because there was not under the Charter of the City of Owensboro in force December 4, 1889, or under the laws of the State of Kentucky, any power or authority in the Common Council of said city to make or grant any perpetual or irrevocable right or license or privilege to complainant, or any person, or corporation, to occupy the streets of the city, with poles or wires for telephone or telegraph purposes, or any purpose, or conduct a telephone or telegraph business in said city, and the court erred in adjudging that there was such power, or that there is now a valid or subsisting contract between complainant and defendant city to erect or maintain its poles and wires

in the streets, alleys and public ways of said city, or that the grant by the said defendant city to the complainant of the right or privilege to erect and maintain its poles and wires in the streets, alleys and public ways of said city constituted a valid contract between said city and the complainant company.

"Sixth. Because the court erred in adjudging that the complainant company has now any right to conduct a telephone and telegraph business in the City of Owensboro, Kentucky, as claimed in its bill of complaint, or otherwise.

"Seventh. Because the court erred in adjudging that the ordinance enacted by the legislative body of the defendant city in January, 1909, and complained of in the complainant's bill, namely, 'An ordinance requiring the Cumberland Telephone & Telegraph Company to remove its poles and wires from the streets in the city,' is invalid or void, or is in violation of the Constitution of the United States.

"Eighth. Because the court erred in adjudging that the defendant, City of Owensboro, Kentucky, its officers, attorneys, agents, and employes of every character, and each and every one of them, be enjoined or restrained from in any manner interfering with the right of the complainant to erect or maintain, or with its erecting or miantaining its poles and wires in the streets, alleys and public ways in the said City of Owensboro, or from in any manner interfering with or disturbing the complainant in the exercise of its alleged rights in that regard under said grant or alleged contract, or from in any manner interfering with or seeking to impair the obligation of said alleged contract made by the City with complainant, and described or relied upon in the bill herein in respect to erecting and maintaining its poles and wires in the said streets, alleys or public ways of the said city, or in decreasing any injunction herein against the defendant, City of Owensboro, or any of its officers, attorneys or agents or employes.

"Ninth. Because of the plea in bar made by defendant, herein, was a good and sufficient plea, and the court

erred in overruling said plea and adjudging it insufficient, and in sustaining a demurrer thereto.

"Tenth. Because the decree of the Circuit Court herein is contrary to law and is not supported by the evidence.

"Wherefore, the defendant, City of Owensboro, prays that said decree and judgment be reversed."

There was so much of the bill stricken out that we have thought it would save the court some labor to print it, omitting the parts stricken out, and this is done in Appendix A.

BRIEF.

(a) Under the Kentucky Statutes the consolidation of two or more corporations into one corporation terminates the corporate existence of each constituent corporation at the date of such consolidation.

Kentucky Statutes, secs. 555 and 556. See Appendix B, and see, Shields v. Ohio, 95 U. S. 319, 323, 324.

(b) A grant by a municipality to a telephone company of a right to occupy the streets, alleys, etc., of the city, for putting up poles and wires and conducting a telephone business, made under a power to "regulate the streets, alleys and sidewalks, and all repairs thereof," is limited in its duration to the corporate life of the company, under its charter at the time of the grant, where no time is fixed for its duration in the ordinance making the grant.

Birmingham Street Ry. Co. v. Birmingham, 79 Ala. 465, 58 Am. Rep. 615;

Boise City A. W. Co. v. Boise City, 123 F. R., 232;

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City of Owensboro v. Cumberland Tel. & Tel. Co., 174 F. R., 739, 752;
Detroit Citizens St. Ry. Co. v. Detroit Railway, 171 U. S. 48;
Logansport Ry. Co. v. Logansport, 114 Fed. Rep. 688;
Mercantile Trust Co. v. Denver, 161 F. R., 769, 771;
Oregon Ry. Co. v. Oregonean Ry. Co., 130 U. S., 26;
Rock Island v. Central Union T. Co., 132 Ill. App., 248;
Rockwith v. State Road Bridge Co., 145 Mich., 455;
Snell v. Chicago, 133 Ill., 413, 432;
State v. Cape Girardeau & J. G. R. Co., 207 Mo., 85;
State v. Scott Co. M. R. Co., 207 Mo., 54;
St. Clair Co. Turnpike Co. v. Illinois, 96 U. S., 63;
Toll Roads v. People, 21 Col. 429, S. C. 37, L. R. A. 711;
Virginia Canon Toll Road Co. v. People, 22 Col. 249;
Wyandotte E. L. & P. Co. v. Wyandotte, 124 Mich. 43, 47.

(c) Under the provisions of the act of the Legislature of the State of Kentucky creating a new charter for the City of Owensboro, in 1882 and in force when the grant in question was made, the power of amendment and repeal was given and reserved to the City, and the grant to the appellee was necessarily made subject to this power.

Sec. 10 of Acts of Kentucky Legislature, Acts 1881, Vol. 1, pp. 817-856; Kentucky Statutes, (1909), sec. 570; Kentucky Constitution, sec. 190.
Des Moines Gas. Co. v. Des Moines, 44 Iowa 508, 24 Am. Rep., 756;
Greenwood v. Freight Co., 105 U. S., 13;
Griffin v. Kentucky Ins. Co., (Ky.) 3 Bush, 592;
Hager, State Auditor, v. Walker, etc., 128 Ky., 1;
Hopkins v. Swansea, 4 M. & W., 621;
Baker v. Cummings, 181 U.S. 117, 124, 125;
U.P.R.R.Co. v. U.S., 168 U.S. 48, 49.50;
23 Cyc. 1142 and note 57.

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Louisville City Ry. Co. v. City of Louisville, (Ky.) 8 Bush 420;
Presbyterian Church v. City of New York, 5 Cowan 532;
Southern Bell Tel. & Tel. Co. v. City of Richmond, 98 Fed. Rep., 672, 103 Rep., 31;
Stuyvesant v. N. Y., 7 Cowan 585;
Vanderbilt v. Adams, 7 Cowan 349;
Cooley's Const. Lim. 196, (5 Ed.) top page, 240, 241;
Dillon on Mun. Cor., secs. 245-573;
23 Cyc. 1142, and cases cited in note 57.

(d) Power to repeal or modify the ordinance of December 4, 1889, existed not only by the provisions of section 10 of city charter of 1882, but it existed under the provisions of the general reservation act of February 14, 1856, carried into Kentucky Statutes as section 1987; and it also existed by reason of the acceptance of the present constitution adopted in 1891, by appellee, January 31, 1896, section 3, of which provided, " * * * * and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment."

(e) In the absence of express legislative authorization a municipality cannot make a perpetual grant to the use of the streets, and thoroughfares of the city.

Birmingham Street Ry. Co. v. Birmingham, 79 Ala. 465, 58 Am. Rep. 615;
Detroit Street Ry. Co. v. Detroit Railway, 171 U. S. 48;
Logansport Ry. Co. v. Logansport, 114 F. R. 688.

(f) Public grants should be construed liberally in favor of

the public and strictly against the grantee; nothing passes by implication.

Charles River Bridge v. Warren Bridge, 11 Peters 420;
Fertilizing Company v. Hyde Park, 97 U. S. 666;
Greenwood v. Freight Co., 105 U. S. 13;
Knoxville Water Company v. Knoxville, 200 U. S. 33;
Minturn v. Larue, 23 Howard 43, 50;
Northwestern F. Co. v. Hyde Park, 97 U. S. 659, 666;
Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 26, 30;
Thomas v. Railroad Co., 101 U. S. 71;
Turnpike Co. v. Illinois, 96 U. S. 63.

II.

(a) Where there has been a previous litigation between the same parties relative to the same cause of action, the judgment of the court therein places the matter at rest forever between the parties thereto and their privies.

Bigelow on Estoppel, 72, 73, 152;
Black on Judgments, secs. 720, 731;
Case v. Beauregard, 101 U. S. 688;
Coffey v. United States, 116 U. S. 436;
Davis v. McCorkle, 14 Bush (Ky.) 754;
Frances v. Wood, 81 Ky., 22;
Freeman on Judgments, sec. 249, 270;
Hanley v. Donoghue, 116 U. S. 6;
Hardwick v. Young, 110 Ky. 504;
Henderson v. Henderson, 3 Hare 115;
Knoxville Water Co. v. Knoxville, 200 U. S. 33;
Lyon v. Perin Mfg. Co., 125 U. S. 700;
Martin v. Evans, 85 Md. 8; 60 A. S. R. 297; 36 L. R. A. 220;
Rex v. Duchess of Kingston, 20 Howell's St. Tr. 355;
Van Fleet on Former Adjudication, secs. 37, 40.

(b) It is the judgment or decree of the court that settles the matters in controversy and conclusively fixes the rights of the parties. The opinion of the judge or chancellor giving his reasons therefor, "is no part of the judgment itself."

Durant v. Essex Co. 7 Wall. 107, 110;
Case v. Beauregard, 101 U. S. 692;
Freeman on Judgments, sec. 249, and cases cited.

ARGUMENT

The demurrer to the bill and the motion to dismiss the same, because no equitable cause of action is set out and the same is therefore lacking in equitable cognizance, should have been sustained, as we think, because the grant by the city to the appellee had expired and appellee had at the time the bill was filed no right to occupy the streets and ways of the city with its poles, wires, etc., or to conduct a telephone business in the City of Owensboro, the grant not being in perpetuity, but at most only a right or privilege of occupying the streets, during the corporate life of the appellee under its charter, existing at the time the ordinance of the City of Owensboro, of date December 4, 1889, was passed. The corporate life of the appellee, under its original charter then existing, having expired June 9, 1908, and the ordinance complained of having been passed six months afterwards, was valid, the appellee not having applied for or obtained from the city, as it had a right to do, a franchise for the further occupancy of the streets of the city.

Instead of obtaining a franchise for the further occupancy of the streets of the city, appellee immediately filed this bill, claim-

ing a perpetual right of occupancy under the ordinance of December 4, 1889.

We contend, first, that the corporate life of the appellee expired when it was consolidated with the other companies, or, if not at that time, then certainly, June 9, 1908, and that the rule of strict construction should be applied to the grant made by the ordinance of December 4, 1889; secondly, that coupled with the power to make the grant was the right of the city to amend or repeal it, and thirdly, that the plea in bar, demurrer and motion were good in law and should have been sustained.

I.

(1) Did, or not, the corporate existence of the Cumberland Telephone & Telegraph Co. under its charter of date June 8, 1883, cease on March 4, 1898, when it was consolidated with the Great Southern Telephone & Telegraph Co. under the style of the Cumberland Telephone & Telegraph Co.?

(2) Did, or not, the corporate existence of the Cumberland Telephone & Telegraph Co. under the new articles adopted by the consolidation of date March 4, 1898, cease on January 27, 1900, when it consolidated with the Ohio Valley Telephone Co.?

(3) There being no time fixed in the ordinance of December 4, 1889, for the duration of the franchise or privilege of occupying the streets of the City of Owensboro with the poles and wires of the Telephone Company, is that ordinance to be construed as granting such privilege for the then life of the grantee company, which would make it expire June 9, 1908, or

did the grant terminate at the date of the consolidation, or was it a grant in perpetuity?

The first question seems to be conclusively answered in the affirmative by the terms of Sec. 556 of the Kentucky Statutes above quoted. It is therein expressly provided that:

> "The separate existence of the constituent corporations shall cease and the consolidated corporations shall become a single corporation."

Under the consolidation of March 4, 1898, a new corporation was created, having the powers set out in the articles of consolidation, and the two companies ceased to exist under their charters of June 8, 1883. And the second question above must be answered in the affirmative for the same reason. The new corporation created March 4, 1898, ceased to exist on January 27, 1900, when the corporation created March 4, 1898, was consolidated with the Ohio Valley Telephone Co.

The third question covers, as we understand it, the main contention of the appellee.

Judge Lurton, in delivering the opinion of the court in the case first above mentioned and which, as stated, was appealed to the Circuit Court of Appeals, said that the question of whether this grant was in *perpetuity* or limited to the *life of the grantee* corporation, which was the better rule, *was not before the Court*, citing the cases of the Turnpike Co. v. Ill., 96 U. S. 63, and Wyandotte Electric Light & Power Co. v. Wyandotte, 124 Mich. 43. And we may add, nor was the question before the Court in that case of whether or not power to repeal the ordinance of December 4, 1889, was reserved or existed.

The case of Turnpike Company v. Illinois, 96 U. S., 63

(24 L. Ed. 651) *supra*, was a proceeding by information in the nature of a *quo warranto*, instituted on the 13th day of October, 1873, in the St. Clair County Circuit Court, Illinois, by the people of the State of Illinois, at the relation of one Bowman, against the St. Clair County Turnpike Company, charging the Company with unlawfully holding and exercising, without warrant therefor, the franchise of maintaining a toll-gate near Cahokia Creek, upon a street in the City of East St. Louis, called Dyke Avenue, and collecting tolls for passing through the same on said street. The Company justified under its charter, or act of incorporation, and the several supplements thereto. The plaintiff replied that the land occupied by Dyke Avenue had been dedicated by the owners thereof to the City of East St. Louis, as a public street, and that the Legislature, by an act passed March 26, 1869, had granted to the City exclusive power and control over said Dyke Avenue, and imposed upon it the sole right and duty of grading, filling up, paving, sewering and otherwise improving and keeping said street in repair, and the right to abate and remove obstructions therefrom. The Company demurred and insisted that this last mentioned act of the Legislature impaired the obligation of the contract made with itself, in and by its charter and the supplements thereto. The County Court, and the Supreme Court of the State of Illinois, on appeal, held the justification of the Company to be insufficient, and gave judgment of ouster, and this judgment was affirmed by the Supreme Court of the United States. The question for determination was, as stated in the opinion of the Supreme Court, whether any contract was set up by the defendant company in its justification which had been impaired by the subsequent legislation of the State. The charter

of the Company, as set out in its plea of justification, was an act of the Legislature of Illinois, approved February 13, 1847, entitled "An Act to Incorporate the St. Clair County Turnpike Company."

By the first section of this act it was enacted as follows:

> "That all such persons as shall become stockholders, agreeably to the provisions of this act, in the corporation hereby created, shall, and for the term of twenty-five years from and after the passage of this act, continue to be a body corporate and politic, by the name of 'St. Clair County Turnpike Company,' and by that name shall have succession for the term of years above specified; may sue and be sued, complain and defend, in any court of law or equity; may make and use a common seal," etc., conferring the usual corporate powers.

By the second section it was enacted as follows:

> "The said corporation shall have the right to construct and maintain a turnpike road from the bank of the Mississippi river opposite the City of St. Louis, to High street, in Bellville, St. Clair County, Illinois; said road to be made on the Great Western Mail Route."

Provision was then made for erecting certain toll-gates on the line of the road, and a schedule of tolls was prescribed.

The fifteenth section of the charter provided as follows:

> "The State reserves the right to purchase said road at the expiration of said charter, by paying to said corporation the original cost of said road, laid out and expended in constructing the same, to be ascertained by examination of the books of said corporation, by commissioners to be ap-

pointed by the Legislature; and, in case of non-payment or redemption by the State at the expiration of the charter, the said road, with all its appendages, shall remain in the possession of said corporation, to be used, controlled, and possessed under the rights and restrictions in this charter contained, and may demand and receive tolls as herein stated, until such time as the State shall refund said sum of money, the original cost of construction, and which right the State hereby reserves."

The 17th and last section of this charter was as follows:

"The corporation hereby created shall be safe and secure for and during the term of the charter, and until the road shall be redeemed by the State as provided, in all the rights, interests and privileges granted and intended to be conferred to said company by the strict letter and meaning thereof, the corporation complying strictly, clearly and fully on their part."

It was conceded that the original route of the turnpike as located under the second section of the Company's charter did not embrace Dyke Avenue, where the toll-gate complained of had been erected; that that Avenue extended from Cahokia Creek to the present bank of the river and was connected by a bridge across Cahokia Creek, with the turnpike as originally located.

A supplement to the charter of the Company was passed February 16, 1861, the second section of which was as follows:

"The St. Clair County Turnpike Company is hereby authorized to extend their road across Cahokia Creek, using the bridge over said creek which connects the St. Clair County Turnpike Company with the dike on Bloody Island, and over said dike to its western shore opposite

> the City of St. Louis; and shall keep the road on said dike and bridge in good repair and build a new bridge if the present one should float away or become unsafe for traveling, but shall not be held responsible for any destruction of the dike by high floods; and the said Company is hereby authorized to erect a toll-gate on said dike, or on or near said bridge, and collect the following rates of tolls, viz:" (certain tolls being then prescribed).

It was by virtue of this act that the defendant company acquired the right to erect and maintain a toll-gate and to exact the tolls in question in that case.

It will be observed from the foregoing that the charter of the Company expired February 13, 1872, eight months prior to the *quo warranto* proceeding, but the defendant company contended that inasmuch as the State had never redeemed the franchises granted to it, nor paid or offered to pay the cost of constructing the turnpike, or attempted to exercise the right reserved in the fifteenth section of the company's charter, the company was entitled by virtue of that section to hold possession of and take tolls on Dyke Avenue, as well as on the original line of its road. It was held, however, that the dike and the bridge over Cahokia Creek never became the property of the defendant company, that their use was merely granted to it so that it could not be said that they formed a part of the road constructed by the Company, which the State, in electing to take is road, would have to pay for; that the franchise of charging tolls for their use was entirely distinct and separate from the franchise of charging tolls for the use of the road constructed by the company, and that the fair construction of the act of 1861 was that it was designed that the company should have the use of the bridge and dike with the right to charge tolls there;

on, until the period fixed for the termination of the company and the taking control of its road by the State, and no longer. The court, in discussing the question involved, said:

> "The original charter of the Company gave it the right, in consideration of building the turnpike authorized thereby, and of keeping it in repair, to erect certain toll-gates, and to exact certain tolls for the use of the turnpike, until the expiration of twenty-five years from the date of the charter, and as much longer as the State should fail to redeem the franchises so granted, by paying the cost of the work. This was undoubtedly a contract; but it related only to the turnpike then authorized to be constructed. Any donations or franchises which the State might subsequently grant to the Company would stand upon their own considerations, and could not fairly be claimed as parcel of the consideration of the original contract. In 1861, when the term of the charter had more than half expired, the State gave the company a new and additional privilege, namely: the privilege of using the bridge and dike in question, and of erecting a toll-gate thereon. The only consideration required was, that the Company should keep them in repair; but should not even be responsible for any destruction of the dike by high floods. The consideration was continuous, and correlative to the continued use. No term was expressed for the enjoyment of this privilege; and no conditions were imposed for resuming or revoking it on the part of the State. It cannot be presumed that it was intended to be a perpetual grant; for the Company itself had but a limited period of existence. At comomn law, a grant to a natural personal, without words of inheritance, creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists. By analogy to this, a grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, would only create an estate for the life of the corporation. In the present case, the Turnpike Company was created to contin-

ue a corporate body only for the term of twenty-five years from the date of its charter; and although, by necessary implication, a further continuance, with the special faculty of holding and using the turnpike authorized by the act until redeemed by the State, is given to it for that purpose, yet it is only by implication, arising from the necessity of the case, and, therefore, cannot be extended to other purposes and objects. Grants of franchises and special privileges are always to be construed most strongly against the donee and in favor of the public. We think the Supreme Court of Illinois construed the grant liberally in this case, when it declared 'the fair construction to be, that it was designed the corporation should have the use of the bridge and dike, with the right to take tolls thereon, until the period fixed for the determination of its existence; and we think that that period cannot be extended by implication beyond the prescribed term of twenty-five years, except for the purposes contained in the charter.' "

It will thus be seen that the court held that under the acts of the Legislature referred to there were two separate and distinct rights or franchises granted to the defendant company, besides its right to exist as a body corporate and politic for a period of twenty-five years, the first being the right granted to it under the act of February 13, 1847, to construct and maintain a turnpike road from the bank of the Mississippi river opposite the City of St. Louis, to High street in Belleville, St. Clair County, Ill., and to erect toll-gates on the line of the road and charge certain prescribed tolls for travel on said road, and the second being the right granted to it under the act of February 16, 1861, to extend its road across Cahokia Creek, using the bridge over said creek which connected its road with the dike on Bloody Island and over said dike to its western shore opposite the City of St. Louis; that these two grants were sep-

arate and distinct and each stood upon its own consideration, and that the second grant could not fairly be claimed as a parcel of the consideration of the first grant.

No term was expressed in the act of February 16, 1861, *for the enjoyment of the right and privileges therein granted.* No conditions were imposed for resuming or revoking same on the part of the State, and the court held that it could not be *presumed* that this grant was intended to be a perpetual grant, for the company itself had but a limited period of existence, and that the grant expired with the expiration of the corporate existence of the company, that is, twenty-five years after the passage of the act incorporating it. In order to avoid the operation of this rule the Company claimed that although it was created to continue a body corporate for only the term of twenty-five years from the date of its charter, it had the right of continued existence, with the right to enjoy not only all the rights and privileges granted to it in its charter, of constructing and maintaining a turnpike road from the bank of the Mississippi river opposite the City of St. Louis, to High street in Belleville, St. Clair County, Illinois, and to maintain toll-gates thereon and receive and collect tolls for travel on said road, but also the right to maintain a toll-gate near Cahokia Creek on Dyke Avenue, which was granted to it by the act of February 16, 1861, until the State should redeem the franchise originally granted to it in its charter, which right of redemption was reserved by the State in section 15 of the charter. The court, however, held against this contention, on the ground that, although by necessary implication, a further continuance with the special faculty of holding and using the turnpike authorized by the act creating the Company until the same should be redeemed

by the State, was given to the Company for that purpose, yet this was only by *implication*, arising from the necessity of the case, and, therefore could not be extended to other purposes and objects, and could not be so extended as to operate on the grant claimed by the company to use Dyke Avenue under and by virtue of the terms of the act of February 16, 1861.

And in the case of Wyandotte Electric Light and Power Company against Wyandotte, 124 Mich., 43, the Supreme Court of Michigan, in discussing the effect of a grant by a municipality to a corporation, which gave to Electric Light Companies the authority, "to lay, construct and maintain conductors for conducting electricity through the streets, alleys and squares of any such city, town or village with the consent of the municipal authorities thereof, under such reasonable regulations as they may prescribe; and such corporation may make all such contracts and by-laws as may be deemed necessary and proper to carry into effect the foregoing powers," said:

> "By this statute electric light companies are given the same rights in the streets as are telephone companies when the assent of the municipality is obtained. An incorporation under this act, a petition to the City to erect poles and wires, or for a franchise for that purpose, and the grant of the same by the City, would make a contract binding for the life of the corporation. It would be immaterial that no time for the existence of the right of the franchise was specified. The grant in such case would be limited to the period of existence fixed by the charter. If a railroad company were organized for a period of thirty years, and a party, natural or corporate, should grant it a right of way without specifying the time of user, the grant would be for the life time of the corporation. The law would imply that both parties contracted with reference to its period of existence. The same rule is applicable here. St. Clair

County Turnpike Co. v. Illinois, 96 U. S., 68, 24 L. Ed., 651."

And there are other cases to the same effect. See, Boise City A. & W. Co. v. Boise City, 123 F. R. 232; City of Owensboro v. C. T. & T. Co., 174 F. R. 739, 752; Mercantile Trust Co. v. Denver, 161 F. R. 769, 771; Oregon Railway v. Oregonean Railway, 130 U. S. 26; Rockwith v. State Road Bridge Co., 145 Mich., 455; Rock Island v. Central Union Tel. Co., 132 Ill. App., 248; Snell v. Chicago, 133 Ill. 413, 432; State v. Scott Co. M. R. Co. 207 Mo., 54; State v. Cape Girardeau, etc., Co., 207 Mo., 85; Toll Roads v. People, 22 Col., 429, S. C. 37 L. R. A. 711; Virginia Canon Road Co. v. People, 22 Col. 249.

Under these authorities it is contended for the appellant that the grant made by the ordinance of December 4, 1889, has expired. If not when the consolidations took place, it did on June 9, 1908; that that is the utmost period for the existence of the grant; that the words "successors and assigns" cannot be construed as making the grant perpetual; that the rule of strict construction should be applied, and that those words mean nothing more than that during the period intervening between the date of the grant by the city, December 4, 1889, and June 9, 1908, the franchise or privilege granted by the city might be transferred or assigned. Oregon Railway Co. v. Oregonian Railway Co., 130 U. S. 30; Thomas v. Railroad Co., 101 U. S. 71; Fertilizing Co. v. Hyde Park, 97 U. S. 666; Knoxville Water Co. v. Knoxville, 200 U. S. 33; Charles River Bridge Co. v. Warren Bridge, 11 Peters 420.

Had there been power to do so and had it been intended to

make a perpetual grant there would have been plain unequivocal terms employed free from doubt.

Moreover, assuming that there was power in the Common Council to make the grant, which it made, still it is settled law that a *perpetual* grant of a franchise or privilege cannot be made by a municipality except as there has been *express legislative authority* given the municipality so to do. Detroit Citizens St. Ry. Co. v. Detroit Ry., 171 U. S. 48; Logansport Ry. Co. v. Logansport, 114 Fed. Rep. 688; Birmingham Street Ry. Co. v. Birmingham, 79 Ala. 465; 58 Am. Rep. 615.

The power to pass the ordinance of December 4, 1889, *was coupled with the power to repeal it.* Sec. 10 above quoted, of the charter of the City of Owensboro then of force, provides that the Common Council shall have control of the finances and all property, real and personal, belonging to the city, "and shall *have full power* to make, publish, amend *and repeal all ordinances* for the following purposes:"

The power to repeal is thus expressly reserved. The adoption of an ordinance is an act of legislation. The repeal of an ordinance is an act of legislation. As to all of the fifty-seven objects mentioned in the sub-sections of this section 10, the power of repeal was reserved.

And this provision of section 10 of the city charter of 1882, is in accord with the long established policy of the State. On February 14, 1856, a general reservation act was passed by the Legislature, and is now contained in the Kentucky Statutes, as follows:

> "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the fourteenth of February, 1856, and all other statutes, shall be subject

to repeal at the will of the General Assembly, unless a contrary intent be therein plainly reserved: Provided, that whilst privileges and franchises so granted may be repealed, no repeal shall impair other rights previously vested." (Sec. 1987.)

The ordinance of January, 1889, was declaratory of the fact, that the right of appellee to occupy the streets had expired, June 9, 1908; that its occupancy of the streets with its poles, etc., was a nuisance, and the requirement in the ordinance that it remove them and upon its failure to do so, that the Mayor have them removed, except as the company purchased a franchise to occupy the streets as provided by law, constituted a repeal of the ordinance of December 4, 1889.

The ordinances of a municipality have force by virtue of the legislative power of the State delegated to it, and have the same effect within the territory of the city that an act of the Legislature of the State would have. 1 Dillon Mun. Corp., sec. 573; Hopkins v. Swansea, 4 M. & W., 621; DesMoines Gas Co. v. DesMoines, 44 Iowa 508, 24 Am. Rep., 756.

The provisions of sec. 1987, *supra*, seem broad enough to cover such legislation as the ordinance of December 4, 1889. Ordinances must not be in conflict with the general laws of the State, or the city charter, otherwise they are invalid. Cooley's Const. Lim. (5 Ed.) top page, 240, 241.

The appellee accepted the present Constitution of Kentucky adopted in 1891, (Trans. pp. 17, 18), one clause of which (Sec. 3) provides that, " * * * every grant of a franchise, privilege or exemption shall remain subject to revocation, alteration or amendment."

We, therefore, respectfully submit that the Common Council

of the city had ample authority to pass the ordinance of January, 1909, repealing the ordinance of December 4, 1889, under the City Charter of 1882, Sec. 10; under the Act of 1856, now Sec. 1987, Ky. Stats., and, under the present Constitution of the State, Sec. 3.

The "vested rights" referred to in the Act of 1856, *supra*, are such as vested in third parties previous to the repeal. Griffin v. Kentucky Ins. Co., 3 Bush 592; Deposit Bank v. Daviess County, 102 Ky. 174; Greenwood v. Freight Co., 105 U. S. 19; Savings Bank v. Owensboro, 173 U. S. 653.

It was not within the competency of the Legislature to disable itself by contract or otherwise from the exercise of this power.

It was said by Judge Lindsay in Louisville City Ry Co. v. City of Louisville, 8 Bush 420:

> "The General Assembly of the Commonwealth has delegated to it (City of Louisville) for a common benefit the power to regulate and control these streets and highways. This power the city cannot refuse to exercise when public necessity or convenience demands that it shall be done, nor can it be allowed to excuse its failure in this particular on the ground that it has by contract deprived itself of the right to act. Presbyterian Church v. the City of N. Y., 5 Cowan 532; Vanderbilt v. Adams, 7 Cowan 349; Stuyvesant v. N. Y., 7 Cowan, 585; Cooley's Const. Lim. 196."

And Judge Dillon in his work on Mun. Cor., Sec. 245, says that:

> "Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot, as we have just seen, be delegated, so *they cannot without legislative authority, express or implied, be bargained or*

bartered away. Such corporations may make authorized contracts, but they have no implied power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties. The cases cited mark the scope and illustrate the application of this salutary principle in a great variety of circumstances, and, for the protection of the citizen, it is of the first importance that it shall be maintained by the courts in its full extent and vigor."

A great number of cases are cited, among them the case of the Louisville City Ry. Co. v. City of Louisville, 8 Bush, 415, and see Southern Bell Telephone & Telegraph Co. v. City of Richmond, 98 Fed. Rep. 672 and 103 Fed. Rep. 31, and Greenwood v. Freight Co., 105 U. S. 13.

The ordinance of December 4, 1889, does not purport to grant in *perpetuity* the use of the streets. No such claim can be made except upon construction, and in all public grants the rule of strict construction is universally applied. The grant is a public grant made by the Legislature of the State, through the Common Council of the city, subject to the limitations which the Legislature imposed on the power of the municipality to make it. It could not make it on any other terms than those contained in Sec. 10, and the Circuit Court of Appeals in the case hereinbefore referred to, between the same parties to this appeal, expressly held that it was made under that section, including sub-section 27. The grant is to a *quasi* public corporation. The easement granted is in the public highways of the city. There is nothing in the ordinance that is expressly inconsistent with the power of repeal. Section 6 of the ordinance providing that, "This ordinance may be altered or amended as

the necessities of the city may demand is mere surplusage." Section 10 of the city charter, expressly included the power to alter, amend and repeal.

In the Southern Bell Telephone & Telegraph Co. v. City of Richmond, 103 Fed. Rep. 31, the statute under which the grant was made is quoted. The power of repeal was not reserved in the statute, but the right to repeal was reserved in the ordinance. The case was decided finally before the Court of Appeals for the Fourth Circuit. The subject is discussed and several cases cited in the opinion of the Court by Circuit Judge Goff, 98 F. R. 672.

In the case of Greenwood v. Freight Co., 105 U. S. 13, the power of repeal was exercised under a general reservation act of the State of Massachusetts, and there are a great number of cases in which such power has been held valid under similar acts. A number of cases are collected in the opinion.

The appellee accepted the grant made to it by the ordinance of December 4, 1889, necessarily under the provisions of the law as it then existed.

The grant could not be made otherwise than under Sec. 10 of the charter of 1882.

There was express power, coupled with the power to make the grant, to repeal the ordinance by the adoption of the ordinance of January, 1909. The repeal is valid, and necessarily the appellee has no right since the repeal to occupy the streets of the city. The ordinance, to be sure, does give the appellee the right to remove its poles within a reasonable time, but it comes into court before the lapse of a reasonable time, or any time, in fact, and during the month of January it filed this bill assailing the validity of the repealing ordinance.

We, therefore, respectfully submit that, there being no express authority contained in the charter of the city authorizing it to make a *perpetual* grant, the ordinance of December 4, 1889, if it is to be construed as attempting to make a perpetual grant, is void, or if not void *in toto* it is void as a grant beyond the corporate life of the grantee corporation, and, that all rights vested in the appellee under the ordinance of December 4, 1889, expired at the end of the original corporate life of the grantee corporation; that the life of this corporation terminated when the consolidation took place, or, if not then, certainly at the time fixed in the articles for its expiration, namely, at the end of twenty-five years from the date of its articles of incorporation, which made it expire on the 9th day of June, 1908.

If, however, the Court shall not agree with us in these conclusions, we submit that there was express power to repeal the ordinance reserved, or rather, perhaps, coupled and running with the grant to repeal the ordinance at any time, and that this power was exercised, if not fully, at all events sufficiently to require the appellee to remove its poles and wires from the streets. If the Common Council had power to absolutely repeal, it certainly had power to make a partial repeal.

We think, therefore, that the demurrer and motion to the bill should have been sustained and the bill dismissed for want of equity.

The case recently decided by this court, City of Louisville v. Cumberland Telephone & Telegraph Co., 224 U. S. 649, is not, we think, inconsistent with our contentions in this case, with reference to the character of the grant or its duration. The charter of the Ohio Valley Telephone Company was perpetual, and power was given in the charter of the company,

which was granted by a special Act of the Legislature of the State, to "construct, equip and maintain said telephone systems and exchanges, and erect poles and string wires thereon, and operate its telephone lines over, along, or under any highway, street or alley in the City of Louisville, with and by the consent of the General Council of said city," etc., (Transcript, p. 38). And afterwards the General Council by ordinance assented to the perpetual use of the streets conformably to the Act of the Legislature creating the corporation, and it was held that this constituted a direct legislative grant which could not be revoked by a municipal ordinance. The corporate life of that company was in perpetuity, whereas, in the present case the corporate life of the appellee company was limited to the period of twenty-five years from its incorporation, and the ordinance of the City of Owensboro, of December 4, 1889, was passed long prior to the consolidation of the company with either the Ohio Valley Company, or the Great Southern Telephone Company, (Transcript, pp. 25, 42), and the grant made by it was not for any specified time.

II.

It appears from the plea in bar that there was, in the year 1900, a suit in equity brought by the appellee Telephone Co. against the appellant City of Owensboro at the time the city was engaged in the construction of its electric light plant.

The persons whom the City had employed to erect the plant, that is, the Westinghouse, Church, Kerr & Co. and one Scott, under whose superintendence the contract for the installation of the plant was being carried on, were also made defendants.

In that case, as in this, the appellee set out the ordinance of December 4, 1889, claiming it had a *perpetual grant* to the use of the streets of the city for the purpose of erecting its poles and wires, and conducting a telephone business in said city, and, in substance, an exclusive right to occupy the sides of the streets on which it had erected these poles and wires; that the city was engaged in putting up an electric light plant and stringing its wires near to and in the midst of the telephone wires of the appellee. It sought to perpetually enjoin the city from interfering with its alleged perpetual and exclusive right to the use of the streets.

The city filed an answer in which every material allegation of the appellee's petition was controverted, and then alleged that, under the powers contained in its charter, it was engaged in constructing an electric light plant, and that it had lawful authority so to do.

The case was prepared for trial. A mass of evidence was taken on the issues formed by the pleadings. It was submitted for final judgment and the circuit court *dismissed the appellee's petition without qualification* and rendered judgment against it for costs.

The right of the appellee to occupy the streets of the city was directly put in issue. It was denied that it had any perpetual grant, or any grant at all, for the use of the streets for the purpose of stringing its wires or carrying on a telephone business in the City of Owensboro. That was one of the issues distinctly made in that case, and on that issue the appellee was defeated.

It is a well established principle that a final decree in chanecry dismissing a bill absolutely puts the whole matter embraced in

the suit *res judicata*. Those matters cannot be again litigated between the parties, or their privies.

In Durant v. Essex Co., 7 Wallace 109, in which the question was involved, Mr. Justice Field, who delivered the opinion of the Court, said:

> "The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy and constitutes a bar to any further litigation of the same subject between the same parties."

Case vs. Beauregard, 101, U. S. 688, was a suit in equity upon the same equities and causes of action which had been formerly litigated between the same parties wherein a judgment had been rendered dismissing the bill without qualification. In this suit the defendants pleaded the former suit in bar and the court below dismissed the bill, and on appeal to the Supreme Court the judgment was affirmed.

The Court said, in the opinion, delivered by Mr. Justice Strong (page 692):

> "Thus it appears the bill exhibited all that was necessary to give to the Court, sitting as a court of equity, complete jurisdiction over the subject of the controversy between the parties, and over all the equities now asserted by the complainants in his present suit. It must, therefore, be held that the decree dismissing that bill determined the equities of the case. *And this must be so, whether the reasons for the dismissal were sound or not.*" (Italics ours.)

In Coffey vs. U. S., 116 U. S. 436, the facts were that Coffey had been proceeded against by a criminal information

for a violation of two sections of the Internal Revenue laws, which imposed a fine and imprisonment for the frauds denounced by those sections against the Revenue. Upon a trial of the criminal information Coffey was acquitted. There was also a proceeding *in rem* against the still, tubs and several barrels of brandy which belonged to Coffey for the purpose of forfeiture and sale under the same sections of the Statute. On the trial of this proceeding *in rem* Coffey appeared as claimant and pleaded the prior judgment of acquittal on the criminal information against him by the United States as a bar to the action. There was a verdict and judgment condemning the property. On appeal to this Court the judgment was reversed and the case remanded with directions to enter a judgment for the claimant, dismissing the information. Reference is made by Mr. Justice Blatchford in the opinion to the case of Rex vs. the Duchess of Kingston, 20 Howell's St. Trials, 355, in which case it is said that the result of the rules laid down in that case could be formulated thus:

> "The judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. In the present case, the court is the same court, and had jurisdiction, and the judgment was directly on the point now involved, and between the same parties."

The Daviess Circuit Court and the United States Circuit Court are courts of concurrent jurisdiction to the extent that

the United States Circuit Court is given jurisdiction by the statute. The State Circuit Court is a court of general jurisdiction, and it is alleged in the plea that it had jurisdiction of the parties and of the subject matter. However, this Court will take notice of these facts without being specifically pleaded, since it takes judicial notice of all the law of the State. Hadley vs. Donoghue, 116 U. S. 6.

In Lyon v. Perin Mfg. Co., 125 U. S. 700, the defendants interposed a plea of former adjudication. In the former suit the complainant's bill was *dismissed*. In the opinion of the Court, delivered by Mr. Justice Lamar, it is said that:

> "It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of the four conditions, namely, (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made."

The judgment of the lower court dismissing the bill was affirmed and several authorities are cited.

In the case of Martin v. Evans, 85 Maryland, 8, 60 A. S. R. 297, 36 L. R. A., 220, the Supreme Court of Maryland had occasion to consider whether a decree dismissing a suit absolutely and without qualification should be modified by the opinion of the chancellor delivered in the case. In the course of the opinion Chief Justice McSherry said:

> "Whevener a decree dismissing a bill in equity fails to restrict its own scope, the presumption, according to the great preponderance of decided cases, is, that the issues raised by the proceedings have been disposed of on their

merits and they therefore become *res adjudicata.* When 'the decree of dismissal is unqualified, it is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further litigation of the same matters between the parties:' Tankersley v. Pettis, 71 Ala. 179; Story's Equity Pleading, 793; Adams v. Cameron, 40 Mich. 506; Thompson v. Clay, 3 T. M. Mon. 359; 16 Am. Dec. 108; Pelton v. Mott, 11 Vt. 148; 34 Am. Dec. 678; Stickney v. Goudy, 132 Ill. 213; Kelsey v. Murphy, 26 Pa. St. 778; Foote v. Gibbs, 1 Gray, 412; Thurston v. Thurston, 99 Mass. 39; 6 Ency. Pl. & Pr. 993, and the large number of cases there collected. In Foote v. Gibbs, 1 Gray, 412, it was said: 'There is nothing to indicate the grounds of dismissal in this case, except the fact of dismissal after an appearance for defendants. But the authorities, both in England and in this country, are decisive that a general entry of bill dismissed with no words of qualification such as dismissed without prejudice, or without prejudice to an action at law, or the like, is conclusively presumed to be upon the merits and is a final determination of the controversy.'

* * * * * * * * *

"The broad terms of the decretal order dismissing the bill cannot be limited, qualified, or restricted by the opinion filed in the equity case. 'The opinion of the Judge is the expression of the reason by which he reaches his conclusion; these may be consistent or contradictory, clear or confused. The judgment or decree is the fiat or sentence of the law, determining the matter in controversy, in concise technical terms, which must be interpreted in their own proper sense. It would, we think, be of dangerous tendency to make the force and effect of the most solemn official acts depend upon the various interpretations which ingenuity might suggest to the most carefully considered language introducing them:' State v. Ramsburg, 43 Md. 333. Or as succinctly expressed in Durant v. Essex Co., 7 Wall, 107, the reason for the signing of a decree is no part of the judgment itself.' The decree and not the opinion is the instrument through which the court acts:

Woods v. Fuller, 61 Md. 460." See also 23 Cyc. 1142, and cases cited in note 57.

In Freeman on Judgments it is said in Sec. 249 that:

> "*The effect of a judgment as res judicata is not limited nor enlarged by the reasons given by the court for the rendition.*" (Italics ours.)

See also, Bigelow on Estoppel, pp. 72, 73, 152; Van Fleet's Former Adjudication, Secs. 37, 40; Freeman on Judgments, Secs. 249, 270; Black on Judgments, Secs. 720, 731.

The former suit, the suit in the Daviess Circuit Court, was by the complainant, now appellee in this bill, against the defendant (now appellant) in this bill, and two of its servants or employes with whom the city had made a contract for the installation of an electric light plant. (Transcript pp. 74-89). The remedy sought in the case was a perpetual injunction. The right to that remedy was claimed under the ordinance of December 4, 1889, the same ordinance set up in this bill. (Transcript pp. 87, 89, 90, 91.)

It was claimed that the complainant had not only the right to occupy the streets, but that its right of occupancy was *perpetual.*

It was claimed that the city had no right to interfere with the plaintiff's right to occupy the streets and to injure the property which the plaintiff had put on the streets under the authority of the ordinance.

Distinct issues were formed on thees points *and the appellee's suit was dismissed absolutely.*

It is, however, true that, the Judge of the Daviess Circuit Court delivered an opinion which was filed as part of the record. (Transcript p. 98.) We submit, however, that, *it is the judg-*

ment actually rendered by the court that fixes and settles the rights of the parties to the suit whether the reasons for the decree were sound or not.

In the plea it is alleged that the Daviess Circuit Court was and is a court of *general jurisdiction;* that it obtained and had in said suit, and the proceedings had therein, *full jurisdiction* of the complainant in that cause (appellee here) and of the defendant City of Owensboro, (appellant here) and of the *subject matter of said suit,* and that it had full and complete jurisdiction to render the judgment and decree; that said judgment has *never been set aside, modified or reversed;* that the same *is now and has been in full force and effect from the date of its rendition* (that is, *November 13, 1903*); that the validity ordinance of December 4, 1889, which was involved in that suit, and under which the complainant (appellee) is now asserting the rights, privileges and franchises claimed by it in its bill of complaint herein is the same; that it is the only ordinance, or grant of any character, under or by virtue of which, the defendant (appellant) conferred, or attempted to confer, upon complainant (appellee) any license, privilege, power or authority to erect any poles or string any wires thereon, or establish any exchange, or conduct any telephone service in the said city, or to occupy the streets, alleys or public ways of said city for such purpose, of any purpose; and that the defendant (appellant) pleads said suit and the proceedings had therein, and the said judgment and decree, in bar of the complainant's (appellee's) alleged cause of action set up in its bill herein, etc. (Transcript pp. 72, 73.)

There was identity of persons and parties and of the quality of the persons who sued in that case with the present case, and

there was identity of the cause of the action and of the thing sued for. (125 U. S. 700, *supra.*)

The effect of the judgment dismissing the plaintiff's petition on the issues formed in that case was necessarily a denial of all the claims set up by the appellee of a right to occupy the streets under the ordinance of December 4, 1889.

In the case of Henderson v. Henderson, 3 Hare 115, it is said:

> "Where a given matter becomes the subject of litigation in an adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res judicata* applies not only to the point upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time."

See also Frances v. Wood, 81 Ky. 22; Hardwick v. Young, 110 Ky. 504; Davis v. McCorkle, 14 Bush 754.

We submit that this plea in bar is a good plea and should have been sustained.

Wherefore, we respectfully pray that the judgments of the Circuit Court be reversed.

GEORGE W. JOLLY,
R. S. TODD,
Counsel for Appellant.

APPENDIX "A"

To the Honorable the Judges of the Circuit Court of the United States in and for the Western District of Kentucky, Sitting at Owensboro, Kentucky:

The Cumberland Telephone and Telegraph Company, a corporation organized under the and pursuant to the laws of the Commonwealth of Kentucky, and having its principal place of business in the City of Louisville, in said State, brings this, its bill of complaint, against the City of Owensboro, Kentucky, a municipal corporation created and existing under and pursuant to the laws of the Commonwealth of Kentucky; and,

I.

Thereupon, your orator complains and says that on the 8th day of June, 1883 it was duly incorporated under the laws of the Comomnwealth of Kentucky, and that its charter has since been amended from time to time pursuant to the laws of said State; a copy of its charter and amendments are attached as Exhibit "A," but need not be copied in the issuance of process; that it was organized for the purpose of engaging in the telephone and telegraph business, and that it has continuously since its organization been engaged in such business. * * * * *

II.

On December 4, 1889, the Common Council of the City of Owensboro, being the proper legislative body of said city,

adopted an ordinance in the following words and figures, to-wit:

"Council Proceedings Dec. 4th, 1889.
"Minute Book 'F,' Page 157.

"The following ordinance, after being twice read, was enacted by the following vote, to-wit: Ayes, Mes. Borer, Brotherton, Vargason, Cullon, Higdon, Decker, *Notes*, None, viz:

"Be it ordained by the Mayor and Common Council of Owensboro, Ky.:

"That the Cumberland Telephone Company, its successors and assigns, is authorized and hereby granted the right to erect and maintain upon the public streets and alleys of said city *and* number of telephone poles of proper size, straight and shaved, smooth, set plumb and set erect, and any number of wires thereon with the right to connect such wires with the building when telephone stations are established, provided that such poles shall be located and kept so as not to interfere with the travel upon said streets or alleys or the substantial use thereof by the inhabitants of said city.

"Sec. 2. That the said Cumberland Telephone Company shall erect only one line of poles on a street, except for the length of one block upon the street upon which the exchange building may be located, and where the wires of said company enter such exchange building the said company shall have the right to erect and maintain its poles on both sides of such street and the lowest wire of said telephone company shall not be less than twenty-five feet from the ground, except where such wires enter the exchange building or telephone stations.

"Nothing in this ordinance contained shall be construed as an exclusive right to said company to erect and maintain said poles upon the streets and alleys of said city and no obstruction shall be placed by said company to the erection and maintenance of poles by any other person or company. Such company shall enjoy such rights in common

with all other persons or companies to whom said city may see proper to extend the same right.

"Sec. 3. The said telephone company shall repair all streets and alleys it may enter upon and use for the purpose herein provided, which by the acts of said company or persons in its employ shall have become injured or damaged or been made unsafe.

"All proper precautions and safeguards shall be used to prevent such use from becoming either injurious or annoying to the inhabitants of said city, and should any damage or injury result to any person or property by reason of the erection and maintenance of such poles, or the failure to keep the streets and alleys in repair as herein required, and said city shall be held liable by reason thereof, such company shall pay all damages and costs resulting therefrom to the parties injured, or to the city, if paid by her.

"Sec. 4. The rights and privileges herein granted to said telephone Company are upon the terms and conditions following, viz: That said company shall furnish free of charge one telephone for each engine or hose house, now erected or which may hereafter be erected by said city, one for police head-quarters, and one for the Mayor's office, making at this time only two such telephones to be furnished by said company for the use of the city,—shall be kept in good order for constant use by said company.

"Said company shall also allow the city the exclusive use of two feet of one arm on each pole for its fire alarm telegraph. The fire alarm telegraph poles of the city may be used by said company for its wires, provided such wires be kept two feet from the said fire alarm telegraph wires, and such poles used by said telephone company shall be replaced by it when needed.

"Sec. 5. All poles of said telephone company shall be set close to the inner side of the sidewalk curbing.

"Sec. 6. This ordinance may be altered or amended as the necessities of the city may demand.

"This ordinance shall be in force from and after its passage."

Thereupon, pursuant to the *city* granted by the Mayor and Common Council of the said City of Owensboro, your orator did erect poles, string wires thereon, establish an exchange and offer the public a telephone service. The city erected its fire alarm wires on said poles, and has maintained the same there continuously since; and your orator has installed telephones in the various city offices as required by said ordinance, and has maintained the same continuously since to the present time, and the same have at all times since they were installed to the present time been used freely by the city. * * * * * * * * *

In January, 1909, and during the past few days, another ordinance was duly adopted by the Common Council of the City of Owensboro, which is as follows:

"An Ordinance Requiring the Cumberland Telephone and Telegraph Company to Remove its Poles and Wires from the Streets in the City.

"Be it ordained by the Common Council of the City of Owensboro:

"Sec. 1. That whereas the Cumberland Telephone and Telegraph Company has heretofore erected numerous poles in the streets of the City of Owensboro, with wires attached thereto, and has maintained same without right, and whereas said poles and wires obstruct the use of said streets and are a nuisance therein, and it is desirable and beneficial to the city and the use of said streets that said poles and wires be removed therefrom:

"It is ordained that same be removed and said company is hereby required to remove same within a reasonable time from the passage of this ordinance, and upon their failure to do so the Mayor is authorized and directed to have same removed; Provided, however, that said company shall have the right to purchase from said city a franchise authorizing it to maintain said poles and wires

and use same as provided under the laws of the State, upon proper conditions to be prescribed by an ordinance to be passed upon request of said company to the Common Council of said City.

"Sec. 2. All ordinances in conflict with this ordinance are hereby repealed.

"Sec. 3. This ordinance shall take effect from and after its final passage." * * * * * * * *

III.

* * * * * * * * * * * *

IV.

Your orator further charges that the ordinance adopted in January, 1909, violates section 10, of article 1, of the Constitution of the United States, which provides, among other things, that—

> "No State shall pass any bill of attainer ex post facto law, or law impairing the obligation of contracts."

and violates section 1 of article 14 of the Constitution of the United States, which among other things, provides:

> "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

V.

Your orator further charges that the enforcement of said ordinance will cause your orator irreparable injury and damage, and will destroy your orator's property and deprive it of its property without due process of law, and will deny to your orator the equal protection of the law.

Your orator further charges that the enforcement of said ordinance will impair the obligation of your orator's contract with the City of Owensboro.

And if your orator's poles and wires be removed, and the removal be wrongful, the same poles and wires cannot be used to restore the plant, but new poles and wires will have to be purchased and used for the new structure, thus entailing upon your orator the loss of the existing super-structure, and the cost of a new super-structure in addition. Its business in the interim will be interrupted and suspended; and damage incapable of computation will be inflicted upon it.

Your orator charges that the injuries hereinabove set out will be inflicted upon your orator by the City of Owensboro unless restrained and prohibited by this honorable court and that such injuries and wrongs can only be prevented under the orders and decrees of your honors.

VI.

Forasmuch as your orator can have no adequate relief except in this court, and to the end therefore that the defendant, if it can, show why your orator should not have the relief hereby prayed for, and make answer to the matters hereinbefore stated

and charged, your orator prays that your honor grant unto it a writ of subpoena of the United States of America directed to the City of Owensboro, commanding it on a certain day to appear and answer unto this bill of complaint, and to abide and perform such orders and decrees in the premises as the court shall seem proper and required by the principles of equity and good conscience.

And your orator further prays that a provisional or preliminary injunction be issued restraining the said defendant from any interference with the property of your orator, and any interference with its business in the City of Owensboro, Kentucky, and that it be restrained and enjoined from taking any action or interfering in any manner with the right of your orator to erect and maintain its poles and wires in the streets, alleys and public ways in the City of Owensboro, Kentucky, and from in any manner interfering with or disturbing its vested rights, or from in any manner interfering with or seeking to impair the obligation of said contract.

And your orator further prays that upon a final hearing its right to conduct a telephone and telegraph business in the City of Owensboro, Kentucky, be declared and sustained; that its rights secured from the City of Owensboro to erect and maintain its poles and wires be declared and adjudged a valid and subsisting contract, and that the preliminary or provisional injunction be made perpetual. And that said ordinance be declared invalid, illegal and void.

And your orator prays for such other, further and general relief as may to equity and good conscience belong.

APPENDIX B.

KENTUCKY STATUTES, 1909.

§ 555. Any two or more corporations organized under this chapter, or the laws of this or any other State, may consolidate into a single corporation; the directors, or a majority of them, of such corporations as desire to consolidate may enter into an agreement signed by them, prescribing the terms and conditions of consolidation, the mode of carrying same into effect, and stating such other facts as are necessary to be set out in articles of incorporation as herein provided (except the facts required by sub-division 5, section 2, hereof) as well as the manner of converting shares of the old corporation into the new, with such other details and provisions as are deemed necessary: Provided, That such consolidated corporations shall become and be a domestic corporation of this Commonwealth for all purposes, and shall be subject to the jurisdiction of the courts of this State and to all laws of this State regulating corporations organized thereunder, and their law shall not be construed as altering or repealing any law regulating the taxation of bridges over streams forming the boundary line of this State.

Written notice of the intention to consolidate shall be mailed to the address of each stockholder of each corporation at least twenty days previous to entering into such agreement, and such notice shall be published at least two weeks in some newspaper printed and circulated in the county of its principal place of business, and the written consent of the owners of at least two-thirds of the capital stock of each corporation shall be necessary

to the validity of such agreement. (Section as amended by Act March 21, 1902. See following section.)

§ 555a. 1. That all charters or articles of incorporation, heretofore taken out by two or more companies organized under the laws of this Commonwealth consolidating, are hereby declared to be valid, regardless of whether the names and addresses of the stockholders in the consolidating companies be inserted in the articles of consolidation or not; and that all articles of consolidation heretofore taken out are hereby declared to be valid without having the names and addresses of the stockholders inserted therein; and said charters shall be as valid and legal as if each and every stockholder in the companies composing the consolidated company was set out in such articles of consolidation.

§ 556. When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporation are required to be, the separate existence of the constituent corporations shall cease and the consolidated corporations shall become a single corporation in accordance with the said agreement and subject to all the provisions of this chapter and other laws relating to it, and shall be vested with all the rights, privileges, franchises, exemptions, property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities: Provided, That no consolidated company formed under this chapter, or the laws of this State, shall be required to pay any organization tax, except that, if in the consolidation the capital stock of the consolidated company be increased, or be thereafter increased to an amount exceeding the aggregate capital stock of the constituent companies at the time of the consolidation, then in that

event the consolidated company shall not have or exercise any corporate powers until it shall have paid into the State treasury one-tenth of one per centum upon the amount of said increase, and upon such payment shall have filed a statement thereof with the Secretary of State; if, however, any corporation, hereafter formed in another State where no organization tax was required to be paid by it shall be consolidated with one formed in this State, then the organization tax required by the laws of this State shall be paid upon so much of the capital stock of the consolidated corporation as shall be equal to the capital stock of the foreign constituent corporation; or if such foreign corporation hereafter formed may have been required by the laws of its State to pay an organization tax less than that then required to be paid in this State, then upon such consolidation with a corporation of this State an organization tax shall be paid equal to the difference between that required of such foreign corporation in the State of its creation and that which would have been required had it been formed in this State.

APPENDIX C.

A general charter for cities of the third class, to which class Owensboro is assigned, was passed by the Legislature, June 14, 1893, (Ky. Stats., Secs. 3236 to 3480). In the charter it is provided, among other things, as follows:

"Sec. 3290. The Common Council of each of said cities shall, within the limitations of the Constitution of the State and this act, have power by ordinance:

* * * * * * *

"35. To grant the right of way along, over, or cross the streets, alleys and public grounds of the city to any railway, street railway, gas, water, steam heating, telephone or electric light or power company, for a term not exceeding twenty years. Before granting such franchise or privilege, such city shall first, after advertising same for a period of not less than thirty days, in some newspaper published in said city, receive bids therefor publicly, and award same to the highest and best bidder, having the right to reject any and all bids. Said city shall reserve the right to require such companies to conform to any changed or altered grades of said streets and public grounds, to pay the cost of paving or otherwise improving between its rails, and, for reasonable distance on either side thereof, to make culverts beneath same for the free flow of water, and shall not be liable for any damage for delay in the operation of the business of any such company occasioned by any street improvement or repairs, or the constructing, bursting or repairing of any sewer or pipe in or across any street, alley or public ground, or injury by any mob or other violence; and shall reserve the right at any and all times to require a change of rails or mode of construction or operation, to suit public convenience, and to require any pipes raised or lowered, and any wires taken down and laid underground,

as the public good may require, and shall not be liable for the cost or damage occasioned by such changes, and shall reserve the right and power to regulate and control same, and the streets, alleys and public way wherein they may be laid or constructed, as the public good may require. All such grants shall expire and become void, notwithstanding a consideration shall have been paid therefor, unless a *bona fide* organization shall have taken place and business been commenced and prosecuted thereunder in good faith within one year from the date thereof. The council may impose other conditions and terms in addition to and not inconsistent with those enumerated herein. The provisions in this sub-section as to advertisements and bids, and limiting the grant to twenty years, shall not apply to the grant of the right of way to a trunk railway."

(Constitution, Secs. 163, 164.)

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 244

CITY OF OWENSBORO, ... Appellant

vs.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, ... Appellee

BRIEF FOR APPELLEE.

STATEMENT.

May it Please Your Honors:

This appeal involved the right of the City to repeal an ordinance passed in 1889 granting to the Cumberland Telephone & Telegraph Company the right to erect and operate a telephone plant in the City of Owensboro, Kentucky.

The grant, made on December 4, 1889, by the Common Council of the City of Owensboro, is as follows:

> "Be it ordained by the Mayor and Common Council of Owensboro, Ky.:
>
> That the Cumberland Telephone Company, its successors and assigns, is authorized and hereby

granted the right to erect an maintain upon the public streets and alleys of said city any number of telephone poles of proper size, straight and shaved, smooth, set plumb and set erect, and any number of wires thereon with the right to connect such wires with the building when telephone stations are established, provided that such poles shall be located and kept so as not to interfere with the travel upon said streets or alleys or the substantial use thereof by the inhabitants of said city.

SEC. 2. That the said Cumberland Telephone Company shall erect only one line of poles on a street, except for the length of one block upon the street upon which the exchange building may be located, and where the wires of said company enter such exchange building the said company shall have the right to erect and maintain its poles on both sides of such streets and the lowest wire of said telephone company shall not be less than twenty-five feet from the ground, except where such wires enter the exchange building or telephone stations.

Nothing in this ordinance contained shall be construed as an exclusive right to said company to erect and maintain said poles upon the streets and alleys of said city, and no obstruction shall be placed by said company to the erection and maintenance of poles by any other person or company. Such company shall enjoy such rights in common with all other persons or companies to whom said city may see proper to extend the same right.

SEC. 3. The said telephone company shall repair all streets and alleys it may enter upon and use for the purpose herein provided, which by the acts of said company or persons in its employ shall have become injured or damaged or been made unsafe.

All proper precautions and safeguards shall be used to prevent such use from becoming either injurious or annoying to the inhabitants of said city, and should any damage or injury result to any person or property by reason of the erection and maintenance of such poles, or the failure to keep the streets and alleys in repair as herein required, and said city shall be held liable by reason thereof, such company shall pay all damages and costs resulting therefrom to the parties injured, or to the city, if paid by her.

SEC. 4. The rights and privileges herein granted to said telephone company are upon the terms and conditions following, *viz.:* That said Company shall furnish free of charge one telephone for each engine or hose house, now erected or which may hereafter be erected by said city, one for police-headquarters, and one for the mayor's office, making at this time only two such telephones to be furnished by said company for the use of the city,—shall be kept in good order for constant use by said company.

Said Company shall also allow the city the exclusive use of two feet of one arm on each pole for its fire alarm telegraph. The fire alarm telegraph poles of the city may be used by said company for its wires, provided such wires be kept two feet from the said fire alarm telegraph wires, and such poles used by said telephone company shall be replaced by it when needed.

SEC. 5. All poles of said telephone company shall be set close to the inner side of the sidewalk curbing.

SEC. 6. This ordinance may be altered or amended as the necessities of the city may demand.

This ordinance shall be in force from and after its passage."

Trans., pp. 3 and 4.

Under this authority the telephone company immediately erected a telephone exchange and offered the public a telephone service. The City of Owensboro erected its fire alarm wires on the poles and has maintained the same there continuously since. The free telephones required by the ordinance have been furnished and maintained by the Telephone Company, and used by the City continuously since.

Stipulation, Trans., pp. 116-17.

In January, 1909, the City undertook to repeal this ordinance by adopting an ordinance reading as follows:

"Be it ordained by the Common Council of the City of Owensboro:

SECTION 1. That, whereas the Cumberland Telephone & Telegraph Company has heretofore erected numerous poles in the streets of the City of Owensboro, with wires attached thereto, and has maintained same without right, and whereas said poles and wires obstruct the use of said streets and are a nuisance therein, and it is desirable and beneficial to the city and the use of said streets that said poles and wires be removed therefrom:

It is ordained that same be removed and said company is hereby required to remove same within a reasonable time from the passage of this ordinance, and upon their failure to do so the Mayor is authorized and directed to have same removed, *Provided, however*, that said Company shall have the right to purchase from said city a franchise

authorizing it to maintain said poles and wires and use same as provided under the laws of the State, upon proper conditions to be prescribed by an ordinance to be passed upon request of said company to the common council of said City.

SEC. 2. All ordinances in conflict with this ordinance are hereby repealed.

SEC. 3. This ordinance shall take effect from and after its final passage."

Trans., p. 8.

To enjoin the enforcement of this repealing ordinance the bill in this case was filed in the Circuit Court, upon the ground that the obligation of the contract with Appellee was violated by the attempted repeal. The Judge of the Circuit Court held that the repealing ordinance was void and violated the obligation of the contract created under the first above mentioned ordinance passed in 1899, and the City has appealed.

Trans., p. 118.

RES ADJUDICATA.

Appellant insists that in a prior litigation between the same parties in the State Court, the invalidity of the granting ordinance has beona djudicated, and for this position relies upon the following facts set up by plea in the court below:

In 1900 the City of Owensboro commenced the construction of an electric light plant and was erecting its poles and wires in such close proximity to the poles and wires of the Telephone Company as to cause that Company serious concern on account of the high currents of

electricity in the electric light wires, which, it was feared, would destroy the usefulness of the telephone wires, which carry a very low current of electricity. Thereupon suit was instituted by the Telephone Company against the City seeking to restrain it from erecting its electric light wires in such manner as to interfere with the telephone wires. Necessarily in its bill the Telephone Company set up its contract rights with the City of Owensboro, which were threatened. A temporary injunction was granted and immediately dissolved, and application made to a Judge of the Court of Appeals of Kentucky for its reinstatement, which was refused. Thereupon, under the local practice of the Kentucky courts, the case proceeded to a final conclusion without a temporary injunction being in force, and when the case came on for final hearing the City had completed its lighting plant; and the Court, in deciding the case, held that, because the plant had already been completed, it was not proper to grant an injunction—the exact language of the Court being:

> "I was strongly convinced on the original application that an injunction ought not to be granted, and in my opinion no change has taken place in the principles and legal ideas than actuating the Court. Indeed the present situation is more strongly against it, on the idea that an application for injunction will always be denied, 'when it appears that the act to be enjoined has already been committed.' Though it may appear that the alleged evils apprehended by plaintiff, expressed in its petition have been fully realized by defendant's consummation of its then projected work, I deem that no argument is in favor of now granting the injunction."
>
> Trans., p. 98.

The Court adds:

> "In passing upon the question of granting or refusing the injunction I deem in wholly unnecessary to pass upon the validity or invalidity of the ordinance discussed."
>
> Trans., pp. 98—9.

The decree of the Court was in general terms, denying the injunction, but making the written opinion a part of the record.

Trans., p. 97.

The contention of Appellant is that every question raised by the pleadings in that case is concluded in all future litigation between the same parties; but it is insisted that this contention rests upon a mistaken conception of the law.

This litigation is between the same parties, but it is upon an entirely different cause of action. Therefore only such matters in the former litigation are precluded as were expressly adjudged in that litigation.

The general rule is no where better stated than by this court in *Virginia C. C. Co.* vs. *Kirven*, 215 U. S., 257, where it is said:

> "It is established that the bar of a judgment in another action for the same claim or demand between the same parties extends to not only what was pleaded or litigated in the first action, but what might have been pleaded or litigated. If the second action is upon a different claim or demand, the bar of the judgment is limited to that which was actually litigated and determined."

The party setting up the judicial estoppel in the subsequent suit must affirmatively show that the particular point was adjudicated and concluded in the former suit.

De Sollar vs. *Hanscome*, 158 U. S., 216;
Steam Packet Co. vs. *Sickles*, 24 How., 333;
Packet Co. vs. *Sickles*, 5 Wall., 580;
U. S. vs. *Green*, 185 U. S., 256;
Vicksburg vs. *Vicksburg Water Works Co.*, *206* U. S., 496.

In the case of *De Sollar* vs. *Hanscome*, supra, the Court, in denying the estoppel, said:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to the same question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit."

In the case at bar Appellant has introduced the record in the former suit wherein it is conclusively shown that the particular question now sought to be precluded by the former litigation, was not determined, the Court expressly stating in its opinion in that cause that the question now involved was not determined.

It is, therefore, insisted that no question of *res adjudicata*, or judicial estoppel, is involved in the present case.

CHARTER RIGHTS.

It is further insisted by Appellant that since the Cumberland Telephone & Telegraph Company, which was in existence in 1889, when the grant by the City of Owensboro was made, subsequently consolidated with another Kentucky corporation, all of the rights possessed by the grantee corporation lapsed immediately upon the consolidation taking effect. The facts are these:

The Cumberland Telephone & Telegraph Company was organized under the Kentucky statues in 1883 for a period of twenty-five years; the Great Southern Telephone & Telegraph Company was organized under the Kentucky statutes in the same year for a like period; these two companies consolidated in 1889 under the name of Cumberland Telephone & Telegraph Company, and, among other things, in the articles of consolidation, it is provided:

> "Twelfth. Upon the execution and completion hereof, this consolidated corporation shall be vested with all the property, business, credits, assets, and effects of the said consolidating or constituent corporations, without deed or transfer, and shall be bound for all their contracts and liabilities; and the rights, duties, and liabilities of this corporation and the rights and duties of its stockholders shall be as prescribed by the laws of the Commonwealth of Kentucky."
>
> Trans., p. 25.

Thereafter, in January, 1900, that Cumberland Telephone & Telegraph Company consolidated with the Ohio Valley Telephone Company, likewise a Kentucky corporation, under the name of Cumberland Telephone & Tele-

graph Company, and in the articles of consolidation it was provided:

> "Eleventh. Upon the execution and completion hereof, this consolidated corporation shall be vested with all the property, business, credits, assets, and effects of the said consolidating or constituent corporations, without deed or transfer, and shall be bound for all their contracts and liabilities; and the rights, duties and liabilities, and powers and privileges, and franchises of this corporation, and the rights and duties of its stockholders shall be the same as those of the consolidating Companies, or as prescribed by the laws of the Commonwealth of Kentucky, in cases of consolidating corporations."
>
> Trans., p. 42.

These consolidations were had under the authority of the Act of Kentucky of April 5, 1893, which, among other things, provides:

> "When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporation are required to be, the separate existence of the constituent corporations shall cease, and the consolidated corporations shall be come a single corporation in accordance with the said agreement, and subject to all the provisions of this chapter, and other laws relating to it, and shall be vested with all the property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities."

It is thus seen that, under the Kentucky statutes, while the separate existence of the constituent corporations cease, the consolidated corporation becomes at once,

without deed or transfer, the owner of all of the property of the constituent corporations; and, therefore, whatever rights either of the constituent companies possessed, became at once the property of the consolidated corporation.

This exact question has been fully considered by this Court in *Louisville* vs. *Cumberland Telephone & Telegraph Company*, 224 U. S., 661. In that case this Court construed the consolidating statutes of Kentucky with respect to the rights of this particular Company, and held that a street franchise is property, and "being property, it was taxable, alienable and transferable, and, as property, passed to the Cumberland Telephone & Telegraph Company under the express provisions of the Kentucky Statute, which, as of force in 1900, declared that the consolidated company should be 'vested with all the property, business, assets and effects of the constituent companies, without deed or transfer, and bound for all their contracts and liabilities' ".

Therefore, whatever rights, franchises or easements the Cumberland Telephone & Telegraph Company acquired under the ordinance of 1898 from the City of Owensboro is the property of the present Cumberland Telephone & Telegraph Company, Appellee in this case.

As in the *Louisville* case (supra), so in this case, the City dealt with the consolidated Company as it did with the original Company; it continued to use the free service, continued to use the poles for its police and fire alarm wires, and assumed to regulate the rates to be charged its citizens, and it did nothing manifesting the purpose or desire to treat the contract relations at an end, but

permitted the consolidated Company to continue to extend its plant and equipment in serving the inhabitants of the City. No action was taken looking to even an attempted repeal of the rights granted in 1889, until a controversy arose concerning the rates to be charged for service in 1908—after two consolidations, and nearly one year after the original period fixed in the company's charter had expired.

THE RIGHT ACQUIRED UNDER THE 1889 ORDINANCE.

The contention of Appellant is that in 1889, when the ordinance undertaking to grant to the Telephone Company the right to erect and operate a telephone exchange in the streets was passed, the City of Owensboro had no authority to make such grant, and, therefore, the ordinance conferred a mere license, revocable at will.

This question was fully considered by the Court of Appeals for the Sixth Circuit, Judge Lurton delivering the opinion of the Court. The question arose in another litigation between the Telephone Company and the City of Owensboro, involving the question of rate regulation under the ordinance of August, 1908, but in that case, as in this, the City insisted that since it had no authority to make the grant contained in the ordinance of 1889, the Telephone Company was without right on its streets, and, therefore, could not object to any rate the city saw proper to impose or require of it. In discussing the question of whether the City had the power to make the grant of 1889 the Court said:

> "But it is said that neither the general law of the State nor the special charter under which the

City was then operating delegated to the City the power to permit the streets of the city to be occupied by the poles and wires of a telephone company.

It may be conceded that neither a telegraph nor a telephone company can lawfully occupy the streets or alleys of a town without direct legislative authority, or by municipal consent in pursuance of powers delegated by the State. *Morristown* vs. *East Tennessee Telephone Company*, 115 Fed., 304, 305, 53 C. C. A. 132.

That both the municipality and the telephone company supposed that the city had the authority under its charter powers to permit the establishment of poles and the stringing of wires along its streets and alleys is clear from the exercise of the power by the mayor and common council and the action which the telephone company took under this ordinance in entering upon and constructing a telephone system at a cost of more than $100,000.

That power to permit the use of highways and streets for such purposes must reside somewhere is obvious. Primarily, it resides in the Legislature of each State, but, as is well known, is almost universally delegated to the municipality concerned. Reasons of convenience, as well as theories of local rule in strictly local matters, lead us to expect that the local government has the power to regulate the use of its own streets.

Did the local government of Owensboro usurp the legislative functions of the State when it granted a street easement to the Cumberland Telephone & Telegraph Company? We think it did not.

The charter under which Owensboro was

governed in 1889 was a special act of the Kentucky Legislature enacted in 1882. See Acts 1881–82, pp. 817–856, c. 461. It provides for a complete system of municipal government and includes no less than 120 sections, many of which are divided into subsections. Among the powers conferred by section 10 is that of 'control of the finances and all property, real and personal, belonging to the city, and to enact ordinances for a large number of purposes later enumerated. Among the purposes for which it is given legislative power is 'to regulate the streets, alleys and sidewalks, and all improvements and repairs thereof,' etc. Unless this provision gave to the city the power to control its own streets by regulating the uses to which they might be put in the public interest, it was without any such power, aside from that which might be regarded as inherent in a corporation created for the purposes of a municipal government. That such a corporation can exercise only those powers which are either expressly granted or plainly implied from those so granted, or essential to the declared purposes and objects of the corporation, is well settled law. *Detroit, etc., Ry.* vs. *Detroit*, 64 Fed., 628, 639, 12 C. C. A. 365, 26 L. R. A., 667.

But the use of a public street for the construction of poles to carry the wires of such a company is a use within the range of the purposes for which a street may be legitimately used, whether the fee be in the city or its interests be confined to an easement in the land for street purposes. This seems to be the settled rule in Kentucky. *Cumberland Telephone & Telegraph Co.*, vs. *Avritt et al.*, 120 Ky., 34, 38, 85 S. W. 204. In the case just cited, the Kentucky court held that such a use was for a public and not a private purpose, and that the easement of the public included such a method of use, and imposed therefore no new burden upon the

owner of the fee in the street. If, then, such a use is within the general objects and purposes to be served by the power of opening and maintaining public streets why is the grant of a right to so use the public streets an act beyond the powers of the municipal legislature? What power is delegated by the express power to 'regulate' the streets and alleys of the city? Manifestly, something was meant by the power to 'regulate.' The word 'regulate' imports the power to control the use of the streets, and is indeed a word of wider import than 'control' or the power to 'consent' to an easement of way.

In *Detroit, etc., Ry.* vs. *City of Detroit*, 64 Fed., 628, 636, 12 C. C. A. 365, 26 L. R. A., 667, this court held that if under the law of the State of Michigan a street railway was but an improved mode of street use, and therefore not an additional servitude, which might be restrained by abutters, the general powers vested in the City of Detroit to 'prescribe, control and regulate' the manner in which the City streets might be used was broad enough to permit the use of its streets for such a purpose by a company having the requisite franchise of a street railway from the State.

In Section 575 of Dillon on Municipal Corporations, the author, after stating that the usual powers of a general nature delegated to municipal corporations are not sufficient to confer upon them the right to authorize the presence of commercial steam railways upon the streets, says:

> 'But it is otherwise as respects street railways; and the ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit or refuse to permit

the use of streets within their limits for such purposes.'

In *St. Louis* vs. *Western Union Tel. Co.*, 149 U. S. 465, 469, 13 Sup. Ct., 990, 992 (37 L. Ed. 810), the court, in discussing the power conferred upon St. Louis over its streets, said:

'The word 'regulate' is one of broad import. It is the word used in the federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used. If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the street.'

So in 28 Cyc., p. 867, note 55, it is said:

'Under the power to 'regulate' the use of streets, municipal authorities may permit their use for railroad tracks, poles, wires, pipes, etc., of a public nature not inconsistent with the public use to which the streets were dedicated. *State* vs. *St. Louis*, 161 Mo., 371, 61 S. W. 658; *State* vs. *Murphy*, 134 Mo., 548, 31 S. W. 784,

34 S. W. 51, 35 S. W. 1132, 34 L. R. A., 369, 56 Am. St. Rep., 515; *Schopp* vs. *St. Louis*, 117 Mo., 131, 22 S. W. 898, 20 L. R. A. 783; *Pikes Peak Power Co.* vs. *Colorado Springs*, 105 Fed., 1, 44 C. C. A. 333.'

See also *State* vs. *Jacksonville R. Co.*, 29 Fla., 590, 10 South, 590.

Counsel for appellants have cited *East Tennessee Telephone Company* vs. *City of Russellville*, 106 Ky., 667, 51 S. W. 308, as supporting their claim that the general powers found in the charter of Owensboro are not sufficient to sustain the ordinance in question. The ordinance, there referred to as antedating the present Constitution of the State, granted an 'exclusive' franchise. The court said of that exclusive franchise that:

> 'At that time the councilmen of the city had no legislative authority, express or implied, which authorized them to grant such a privilege to him.'

The ordinance under which the Cumberland Telephone Company exercises its street easement expressly provides that the privilege shall not be exclusive. Furthermore, in the Russellville Case, had the ordinance been valid, Clark to whom the privilege was granted, had not started work, in good faith, before the adoption of the new Constitution. Hence his easement was not saved by the proviso found in section 163. But aside from all this, it does not follow that because Russellville did not have power to grant a right or easement to a telephone company under its charter that Owensboro had not the power. The opinion does not show whether Russellville had the power to 'regulate' its streets as Owensboro had.

The case of *Louisville Railway* vs. *City of Louisville*, 8 Bush (Ky.) 415, is not in point. The only question in the case was whether the city might require a street railway company to remove its rails in order to allow the city to repave the street. The city railway was in the streets under an ordinance authorized by express legislative power. All that was said in reference to the insufficiency of a power to control and regulate, to support consent to occupation of streets by a street railway, was foreign to the case and not authoritative.

Other decisions of the Kentucky court cited have been examined. None of them made prior to the inception of the rights here involved concerned the interpretation of any municipal power as is implied from the general power to 'regulate' the use of streets, and none made since the rights of appellee arose are controlling upon this court in the exercise of its independent judgment in respect to rights which arose before such decisions."

City of Owensboro vs. *Telephone Co.*, 99 C. C. A., 1.

In addition to this the Court of Appeals of Kentucky has held that the Fiscal Court of a county, by virtue of its general power to repair and supervise the county roads, is invested with power to grant a franchise for the use of the county roads.

In *A. C. and F. Co.* vs. *Johnson County*, 147 Ky., 71, the Court says:

"The right to grant a franchise presupposes and is based upon the right of the authority granting the franchise to control the property over which the franchise is granted or which is affected by it. For example, the fiscal court could grant a

franchise authorizing the erection of poles along the highways of the county, as the fiscal court has control of the highways. And so, municipal corporations may grant franchises to use the streets and public ways of a city, as the municipality has control of the streets and public ways."

In *Jackson-Hazard Telephone Co.* vs. *Holliday, Admr.*, 143 Ky., 150, the court says:

"That the Fiscal Court, having as it did, under section 4306 of the Kentucky Statutes, the control and supervision of the public roads of the county, had authority before the enactment of Section 4639-b of the Kentucky Statutes to grant the Company the right to erect its poles along this road in the absence of a statute expressly giving the court such authority, is, we think, settled by the case of *Cumberland Telephone & Telegraph Company* vs. *Avritt*, 120 Ky., 34."

In the last cited case, the Court says:

"The telephone takes the place of the private messenger. The transmission of messages by telephone is a business of a public character, which is conducted under public control in the same manner as the carriage of persons or property. The easement of the public is not limited to the particular method of use in vogue when the easement is acquired, but includes improved methods which the progress of society finds necessary for business. The public easement in a highway is not confined to the transportation of persons or things in vehicles."

Section 4306 of the Kentucky Statutes referred to provides:

"The fiscal court of each county shall have gen-

eral charge and supervision of the public roads and bridges therein, and shall prescribe necessary rules and regulations for repairing and keeping the same in order, and for the proper management of all roads and bridges in said county under and subject to the provisions of this act. The public roads shall be maintained, either by taxation or by hands allotted to work thereon (or both) in the discretion of the fiscal court of the respective counties, as hereinafter provided."

Section 4639-b referred to, grants directly to telephone companies the right to use the county roads outside of incorporated cities, only leaving to the Fiscal Courts authority to designate the manner of such use.

Prior to this Act in 1904 the Kentucky Legislature had never assumed to exercise control over the county roads, but had left the control and granting of rights-of-way to the local authorities; and before the Constitution of 1891 the Legislature never did, by statute, assume to exercise any control over the streets of a municipality, but all rights to telephone companies were conferred directly by the municipalities under the authority of the Legislature giving to them the control and regulation of the use of the streets.

Therefore, in Kentucky the only way in which a telephone company could secure the right to erect poles on the streets in a municipality was by action of the municipality, and not by the State.

The authority conferred in this section upon the Fiscal Court with respect to county roads is no broader than the charter powers granted by the Legislature to the City of Owensboro—the City having power under its charter

"to regulate the streets, alleys and sidewalks and the improvements and repairs thereof," and is given "control of the finances and all property, real and personal, belonging to the City."

In other words, the city is given the control of, and the right to regulate the streets. The Fiscal Court is given general charge and supervision of the public roads. Necessarily, the city had the authority by express grant from the Legislature to grant a franchise in the streets if the Fiscal Court has the power to grant franchises on the county roads, as is held by the Kentucky Court of Appeals.

DURATION OF THE GRANT.

Appellant insists that even though the City had the power to make the grant in 1889, a proper construction of its terms limits it to twenty-five years, that being the initial period of the life of Appellee.

In discussing this question Appellant proceeds upon an erroneous assumption of fact. It *assumes* that the Cumberland Telephone & Telegraph Company, which was chartered in 1883, ceased to exist twenty-five years thereafter, and that, therefore, the grant made in 1889 also ceased. This view is not true. At the time the Telephone Company was chartered in 1883, the Kentucky Statutes under which the Company was organized provided that corporations for the construction of any work of internal improvement could be formed to endure for fifty years, and those formed for other purposes not to exceed twenty-five years in duration; "but in either case they may be renewed from time to time for periods not greater than was at first permissible if three-fourths of the

votes cast at any election held for that purpose should be in favor of such renewal."

General Statutes of Ky., 1883 (Bullitt & Feland).

So that while this Company was organized with an initial period of existence of twenty-five years, it had the right under the very statute which authorized its creation, to continue to exist for as long a period of time as its stockholders might desire.

And in accordance with this right, its life *has been* prolonged, and it is now a corporation with a life limited to two hundred years from January 27, 1900; and all of this was done prior to the expiration of the first twenty-five years.

Trans., p. 41.

So that whether the contention of Appellant that franchises without limitation are only for the life of the corporation or in perpetuity, is wholly immaterial in this case. The life of this corporation has not expired, and therefore this contention is immaterial in the present case.

There are cases holding that where a franchise is unlimited as to time it exists for the life of the corporation and then ceases; but these cases find no support in the decisions of this Court, and, indeed, are based upon peculiar facts and circumstances surrounding the particular grants considered by the courts in those cases. Some of them—in fact, practically all of them—refer to the case of *Turnpike* vs. *Illinois*, 96 U. S. 63[illegible]; and that case is relied upon by Appellant, but the particular point upon which that case rests seems to have been overlooked by some courts and by Appellant in this case. There it is said:

"At common law, a grant to a natural person, without words of inheritance, creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists. By analogy to this, a grant to a corporation aggregate limited to the duration of its existence, without words of perpetuity being annexed to the grant would only create an estate for the life of the corporation."

In all of these cases the duration of the grant is arrived at by construction. The terms of the grant control. In the present case the grant was to Cumberland Telephone & Telegraph Company, *its successors and assigns*. It was expressly provided that the ordinance could be altered or amended as the interest of the City might demand. It was further provided that the ordinance should not be construed as an exclusive right; and it was further provided that no obstruction should be placed by the Company to the erection or maintenance of poles by any other person or company, and that such rights should be enjoyed by all other persons or companies to whom the City might extend the same rights.

The City under this grant has reserved all of its police powers with respect to granting similar rights to other concerns, regulating the places and manner of erecting poles and wires, requiring them to be put underground or erected on poles overhead, prohibiting any obstructions being placed in the way of other companies to whom the city might allow the use of the streets. But, in addition to this, the grant was for a consideration other than procuring a telephone service for its inhabitants. It gave to the City the use of its poles for carrying the city's police and fire alarm wires, and it gave free telephone service to the City.

It must also be noted that in the repealing ordinance there was no suggestion by the CommonCouncil of the Cty that the grant made in 1889 had expired, but proceeded upon the idea that no rights had ever been acquired. The repealing ordinance in its first paragraph states that the Company "has heretofore erected numerous poles in the streets of the City of Owensboro, with wires attached thereto, and has maintained the same without right."

It is also to be noted that while in the first paragraph it is stated that the poles and wires obstructed the use of the streets and "are a nuisance, and it is desirable and beneficial to the City and the use of the said streets that said poles and wires be removed therefrom," yet in the second paragraph it is provided that "said company shall have the right to purchase from said City a franchise authorizing it to maintain said poles and wires and use the same as provided under the laws of the State."

It is thus seen that the City proceeded upon the idea that the Company had never acquired any rights; and, second, that while the poles and wires were a nuisance and it was very desirable to have them removed, yet if the Compan ydesired, the City would grant It a franchise to maintain the poles as they were.

It is also to be noted that under the police powers of the City if any pole obstructed traffic or was improperly located, the City had ample power and authority to require the relocation of the pole in such manner as would not be objectionable.

It is also to be noted that these poles did not become a nuisance in the streets until the telephone company declined to yield to the rates fixed by the city for telephone

service in the ordinance adopted in August, 1908, preceding the repealing ordinance which was adopted in January, 1909.

It must also be remembered that a telephone company cannot construct its plant and then operate it. It must continue the construction so long as it continues in use. Unlike a street railway, gas, water or electric light plant, a telephone exchange is built gradually. It is first built to accommodate such patrons as are reasonably presumed to desire service so soon as the plant is put into operation; but, as each new patron is secured, additional wires must be strung from the central station or switchboard to the patron's place of business or residence, new apparatus installed in the patron's house, and connections made by additions to the switchboard which will enable him to be put into communication with existing patrons. So that as the city grows and new persons have need of telephone service the telephone company must continue to enlarge and increase its plant. So that a telephone company—inherently different from other public service companies—must be assumed to have contracted with the City, and the City must be assumed to have contracted with the telephone company with the understanding and knowledge that the plant must continue to grow from year to year, and therefore a limitation of time upon the grant would of necessity either require the telephone company to increase its plant to the last moment of its life, or require the inhabitants of the city to be deprived of telephone facilities for a reasonable period just preceding the expiration of the life of the grant, since it is not to be prosumed that a company would continue to invest new capital in a plant up to the day it was to be taken down.

Especially is this true when it is shown that to take down a telephone plant involves a loss of from 80 to 85% of its cost.

Depo. of Caldwell, Trans., p. 118.

In construing this grant we have the right to assume that the parties contracted with reference to the particular subject matter of the grant and its inherent peculiarities. The City placed no time limit upon the grant, but safeguarded in every way the rights of the City, by reserving the right to use the same poles for its fire alarm wires (never intending to damage itself by having to remove its wires and erect poles for its own use), providing itself with adequate telephone service as the demand therefor increased from time to time, reserving the right to make grants for similar purposes, and finally, providing for unknown and unforeseen contingencies in exacting: "This ordinance may be altered or amended as the necessities of the City may demand." If it be proper, or necessary to resort to a construction of this ordinance to ascertain the time it was intended to operate, the conclusion is inevitable that it was to run to the Telephone Company, "*its successors and assigns*," in perpetuity.

This contention is sustained by all the decisions of this Court; and this, too, whether the charter of the Company was for twenty-five years, or a longer period.

In *Detroit* vs. *Detroit, etc., Ry. Co.*, 184 U. S., 395, it is said:

> "We see no reason why the Company could not take the extended term as provided for in the ordinance, and it formed a good consideration for

the agreement on the part of the company to perform the other obligations contained in the ordinance. This exact proposition has been determined by the Circuit Court of Appeals for the Sixth Circuit in *Detroit Citizens' Street Railway Company & others* vs. *City of Detroit*, 12 C. C. A., 365; same case 64 Fed. Rep., 628. In the course of the opinion of the Court in that case, the cases of *People* vs. *O'Brien*, 111 N. Y. 1, and *Miner* vs. *New York Central Railroad Company*, 123 N. Y., 242, were cited. *People* vs. *O'Brien* is one of the leading cases in New York upon that subject, and it was there held that a corporation, although created for a limited period, might acquire title in fee to property necessary for its use, and where the grant to a corporation of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad; the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to such right. In that case the authorities show that a franchise of the above nature is invested with the character of property and is transferable as such, independently of the life of the original corporation. The other case, in 123 N. Y., announces the same doctrine. It is not a new one, and the decisions have all been one way, in favor of the right of a corporation, limited as to the time of its corporate existence, to purchase or acquire by agreement or condemnation property for its use, the title to which it might own in fee."

In *Louisville* vs. *Telephone Co.*, 224 U. S., 649, the authorities are again reviewed, and the Court approves the following:

"Where the grant to a corporation of a fran-

chise to construct and operate its road is not, by its terms, limited and revocable, the grant is in fee."

To the same effect are:

Walla Walla vs. *Water Co.*, 172 U. S., 9;
People of the State of New York vs. *O'Brien*, 111 N. Y., 1;
Detroit, etc., Ry. vs. *Detroit*, 12 C. C. A., 365, 64 F. R. 628;
Detroit vs. *Detroit, etc. Ry.*, 184 U. S., 395;
Trustees of Southampton vs. *Jessup*, 162 N. Y., 122;
Town of Arcata vs. *Arcata & N. R. R. Co.*, 92 Cal., 639;
People vs. *Central Union Tel. Co.*, 192 Ill. 307;
Hudson Telephone Co. vs. *Jersey City*, 49 N. J. Law, 304;
People vs. *Deeham*, 153 N. Y., 528.

For these reasons it is respectfully submitted that the City was without authority or power to disturb the vested rights of Appellee to conduct a telephone business in the City of Owensboro, because of the Constitutional provisions against the impairment of the obligation of contracts, and against the taking of property without due process of law.

Respectfully submitted,

CLARENCE M. FINN,
HUNT CHIFLEY,
WILLIAM L. GRANBERY,
Solicitors for Appellee.

CITY OF OWENSBORO *v.* CUMBERLAND TELEPHONE & TELEGRAPH CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 244. Argued April 22, 1913.—Decided June 16, 1913.

Rights conferred by a municipal ordinance on a corporation qualified to conduct a public business come from the State through delegated power to the city.

A municipal ordinance granting to a corporation qualified to carry on a public business, such as a telephone system, the right to use the streets for that purpose, is more than a mere revocable license; it is the granting of a property right, assignable, taxable and alienable, an asset of value and a basis of credit.

Such a grant is one of property rights in perpetuity unless limited in duration by the grant itself or by a limitation imposed by the general law of the State or by the corporate powers of the municipality.

The powers of municipalities of Kentucky to grant licenses in the streets for telephones were not limited in 1889 as to time; and, under a charter provision giving power to regulate streets and alleys, a municipality had ample power to grant a franchise to a telephone company to place and maintain poles and wires thereon.

A corporation is capable of taking a grant of street rights of longer duration than its own corporate existence if the grant expressly inures to the benefit of the grantees, assigns and successors. *St. Clair Turnpike Co.* v. *Illinois*, 96 U. S. 63, distinguished.

A reservation to alter or amend in a municipal ordinance, granting rights in the streets to a corporation to carry on a public utility, as the necessities of the city demand, is simply a reservation of police

control incidental to the unabridgeable police power and does not reserve a right to revoke or repeal the ordinance itself.

While the power to destroy contract rights may be reserved by a municipality in the ordinance granting them, the reservation must be clear and explicit.

An ordinance requiring a telephone corporation to remove from the streets its poles and wires which had been placed there under a former ordinance granting permission so to do without specifying any period, or else pay a rental not prescribed in the original ordinance, *held* unconstitutional under the contract clause of the Federal Constitution. *Greenwood* v. *Freight Co.*, 105 U. S. 13, distinguished.

Where, under the statutes of the State, a corporation formed by consolidation of several previously existing corporations becomes by express terms vested with all the assets of such constituent corporations, rights in the streets under municipal ordinances pass to the new corporation, and such rights are protected against impairment by the contract clause of the Federal Constitution.

Where the judgment itself makes the opinion a part of the record, the bar of the judgment is confined to those questions to which the opinion expressly declares the litigation was limited.

THIS case involves the nature and duration of the right of the Telephone Company to maintain its poles and wires upon the streets of the City of Owensboro. The ordinance under which it, or its predecessors in right, title and property, have maintained a telephone system in the City of Owensboro, was passed on December 4, 1889. Inasmuch as it contains several provisions which require consideration, it is set out in full in the margin.[1]

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[1] Council Proceedings, Dec. 4th, 1889.
Minute Book "F," Page 157.

The following ordinance, after being twice read, was enacted by the following vote, to-wit: Ayes, Mess. Baer, Brotherton, Vargason, Cullen, Higdon, Decker, Noes, None. Viz:

Be it ordained by the Mayor and Common Council of Owensboro, Ky.:

That the Cumberland Telephone Company its successors and assigns, is authorized and hereby granted the right to erect and maintain upon the public streets and alleys of said city *any* number of Telephone poles of proper size, straight and shaved, smooth, set plumb and kept erect, and any number of wires thereon with the right to connect such

The grantee under that ordinance at once proceeded to erect its plant and to place its poles and wires upon the streets and it and its successors and assigns have ever since maintained and operated a telephone system. The city

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wires with the building when telephone stations are established, provided such poles shall be located and kept so as not to interfere with the travel upon said streets or alleys or the substantial use thereof by the inhabitants of said city.

SEC. 2. That the said Cumberland Telephone Company shall erect only one line of poles on a street except for the length of one block on the street upon which the exchange building may be located, and where the wires of said company enter such exchange building the said company shall have the right to erect and maintain its poles on both sides of such streets and the lowest wire of said telephone company shall not be less than twenty-five feet from the ground, except where such wires enter the exchange building or telephone stations.

Nothing in this ordinance contained shall be construed as an exclusive right to said company to erect and maintain poles upon the streets and alleys of said city, and no obstruction shall be placed by said company to the erection and maintenance of poles by any other person or company. Such company shall enjoy such rights in common with all other persons or companies, to whom said city may see proper to extend the same right.

SEC. 3. The said telephone company shall repair all streets and alleys it may enter upon and use for the purpose herein provided, which by the acts of said company or persons in its employ shall have become injured or damaged or have made unsafe.

All proper precautions and safeguards shall be used to prevent such use from becoming either injurious or annoying to the inhabitants of said city, and should any damage or injury result to any person or property by reason of the erection and maintenance of such poles, or the failure to keep the streets and alleys in repair as herein required, and the said city shall be held liable by reason thereof, such company shall pay all damages and costs resulting therefrom to the parties injured, or to the city if paid by her.

SEC. 4. The rights and privileges hereby granted to said telephone company are upon the terms, and conditions following, viz: That said company shall furnish free of charge one telephone for each engine or hose house, now erected or which may hereafter be erected by said city, one for police head-quarters, and one for the mayor's office

has used the company's poles for the maintenance of its fire alarm service, and has had the benefit of a free public telephone service for municipal purposes.

In January, 1909, the city council passed an ordinance requiring the telephone company to remove from its streets and alleys all of the poles and wires "within a reasonable time after the passage of the ordinance," and upon failure to so remove, the mayor was directed to have them removed. This was, however, subject to a provision, "that said company shall have the right to purchase from the said city a franchise authorizing it to maintain said poles and wires and use same as provided under the laws of the State, upon proper conditions to be prescribed by an ordinance to be passed upon request of said company to the common council of said City."

This bill was filed for the purpose of enjoining the enforcement of this ordinance, the contention being that it was an impairment of the company's contractual property rights in the streets, and, as such, in contravention of the contract and due process clauses of the Constitution of the United States. Upon a final hearing the court below sustained the bill and permanently enjoined the enforcement of the repealing ordinance.

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making at this time only two such telephones to be furnished by said company for the use of the city, shall be kept in good order for constant use by said company.

Said company shall also allow the city the exclusive use of two feet of one arm on each pole for its fire alarm telegraph; The fire alarm telegraph poles of the city may be used by said company for its wires provided such wires be kept two feet from the said fire alarm telegraph wires, and such poles used by the said telephone company shall be replaced by it when needed.

SEC. 5. All poles of said telephone company shall be set close to the inner side of the sidewalk curbing.

SEC. 6. This ordinance may be altered or amended as the necessities of the city may demand.

This ordinance shall be in force from and after its passage."

Mr. R. S. Todd and *Mr. George W. Jolly* for appellant:

Under the Kentucky Statutes §§ 555 and 556, the consolidation of two or more corporations into one corporation terminates the corporate existence of each constituent corporation at the date of such consolidation. *Shields* v. *Ohio*, 95 U. S. 319, 323.

A grant by a municipality to a telephone company of a right to occupy the streets and alleys of the city, for putting up poles and wires and conducting a telephone business, made under a power to "regulate the streets, alleys and sidewalks, and all repairs thereof," is limited in its duration to the corporate life of the company, under its charter at the time of the grant, where no time is fixed for its duration in the ordinance making the grant. *Street Ry. Co.* v. *Birmingham*, 79 Alabama, 465; *Water Co.* v. *Boise City*, 123 Fed. Rep. 232; *Owensboro* v. *Cumberland Telephone Co.*, 174 Fed. Rep. 739, 752; *Citizens' St. Ry. Co.* v. *Detroit Railway*, 171 U. S. 48; *Railway Co.* v. *Logansport*, 114 Fed. Rep. 688; *Mercantile Trust Co.* v. *Denver*, 161 Fed. Rep. 769, 771; *Oregon Ry. Co.* v. *Oregonian Ry. Co.*, 130 U. S. 26; *Rock Island* v. *Central Telephone Co.*, 132 Ill. App. 248; *Rockwith* v. *State Road Bridge Co.*, 145 Michigan, 455; *Snell* v. *Chicago*, 133 Illinois, 413, 432; *State* v. *Cape Girardeau R. R. Co.*, 207 Missouri, 85; *State* v. *Scott Co. Ry. Co.*, 207 Missouri, 54; *St. Clair Turnpike Co.* v. *Illinois*, 96 U. S. 63; *Toll Roads* v. *People*, 21 Colorado, 429; *Virginia Canon Road Co.* v. *People*, 22 Colorado, 249; *Wyandotte Electric Co.* v. *Wyandotte*, 124 Michigan, 43, 47.

Under the provisions of the act of the legislature of the State of Kentucky creating a new charter for the City of Owensboro, in 1882 and in force when the grant in question was made, the power of amendment and repeal was given and reserved to the city, and the grant to the appellee was necessarily made subject to this power. Section 10, 1 Acts Kentucky, 1881, pp. 817–856; Kentucky Statutes (1909),

§ 570; Kentucky Constitution, § 190; *Gas Co.* v. *Des Moines*, 44 Iowa, 508; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Griffin* v. *Kentucky Ins. Co.*, 3 Bush (Ky.), 592; *Hager* v. *Walker*, 128 Kentucky, 1; *Hopkins* v. *Swansea*, 4 M. & W. 621; *City Ry. Co.* v. *Louisville*, 8 Bush, 420; *Presbyterian Church* v. *New York*, 5 Cowan, 532; *Southern Telephone & Telegraph Co.* v. *Richmond*, 98 Fed. Rep. 672; *S. C.*, 103 Fed. Rep. 31; *Stuyvesant* v. *New York*, 7 Cowan, 585; *Vanderbilt* v. *Adams*, 7 Cowan, 349; Cooley's Const. Lim. (5th ed.) 196, 240; Dillon on Mun. Corp. §§ 245–573; 23 Cyc. 1142, and cases cited in note 57.

Power to repeal or modify the ordinance of December 4, 1889, existed not only by the provisions of § 10 of city charter of 1882, but also under the general reservation act of February 14, 1856, carried into Kentucky Statutes as § 1987; it also existed by reason of the acceptance of the present constitution adopted in 1891, by appellee, January 31, 1896, § 3 of which provided that every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.

In the absence of express legislative authorization a municipality cannot make a perpetual grant to the use of the streets and thoroughfares of the city. *Street Ry. Co.* v. *Birmingham*, 79 Alabama, 465; *Street Ry. Co.* v. *Detroit Railway*, 171 U. S. 48; *Railway Co.* v. *Logansport*, 114 Fed. Rep. 688.

Public grants should be construed liberally in favor of the public and strictly against the grantee; nothing passes by implication. *Charles River Bridge Case*, 11 Peters, 420; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 666; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Water Company* v. *Knoxville*, 200 U. S. 33; *Minturn* v. *Larue*, 23 Howard, 43, 50; *Oregon Ry. Co.* v. *Oregonian Ry. Co.*, 130 U. S. 26, 30; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Turnpike Co.* v. *Illinois*, 96 U. S. 63.

Where there has been a previous litigation between the

same parties relative to the same cause of action, the judgment of the court therein places the matter at rest forever between the parties thereto and their privies. Bigelow on Estoppel, 72, 73, 152; Black on Judgments, §§ 720, 731; *Case* v. *Beauregard*, 101 U. S. 688; *Coffey* v. *United States*, 116 U. S. 436; *Davis* v. *McCorkle*, 14 Bush (Ky.), 754; *Frances* v. *Wood*, 81 Kentucky, 22; Freeman on Judgments, §§ 249, 270; *Hanley* v. *Donoghue*, 116 U. S. 6; *Hardwick* v. *Young*, 110 Kentucky, 504; *Henderson* v. *Henderson*, 3 Hare, 115; *Water Co.* v. *Knoxville*, 200 U. S. 33; *Lyon* v. *Perin Mfg. Co.*, 125 U. S. 700; *Martin* v. *Evans*, 85 Maryland, 8; *Rex* v. *Duchess of Kingston*, 20 Howell's St. Tr. 355; Van Fleet on Former Adjudication, §§ 37, 40; *Baker* v. *Cummings*, 181 U. S. 117–124–5; *S. P. R. Co.* v. *United States*, 168 U. S. 48, 49, 50.

It is the judgment or decree of the court that settles the matters in controversy and conclusively fixes the rights of the parties. The opinion of the judge or chancellor giving his reasons therefor, "is no part of the judgment itself." *Durant* v. *Essex Co.*, 7 Wall. 107, 110; *Case* v. *Beauregard*, 101 U. S. 692; Freeman on Judgments, § 249, and cases cited.

Mr. William L. Granbery, with whom *Mr. Clarence M. Finn* and *Mr. Hunt Chipley* were on the brief, for appellee.

Mr. Justice Lurton, after making the foregoing statement, delivered the opinion of the court.

1. That the right conferred by the ordinance involved is something more than a mere license, is plain. A license has been generally defined as a mere personal privilege to do acts upon the land of the licensor of a temporary character, and revocable at the will of the latter unless, according to some authorities, in the meantime expenditures contemplated by the licensor when the license was given,

have been made. See *Greenwood Lake & P. J. Railroad* v. *New York &c. Railroad*, 134 N. Y. 435, 440; *Trustees of Southampton* v. *Jessup*, 162 N. Y. 122, 126.

That the grant in the present case was not a mere license is evident from the fact that it was upon its face neither personal, nor for a temporary purpose. The right conferred came from the State through delegated power to the city. The grantee was clothed with the franchise to be a corporation and to conduct a public business, which required the use of the streets, that it might have access to the people it was to serve. Its charges were subject to regulation by law and it was subject to all of the police power of the city.

That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right, has been too many times decided by this court to need more than a reference to some of the later cases: *Detroit* v. *Detroit Street Railway Co.*, 184 U. S. 368, 395; *City of Louisville* v. *Cumberland Telephone and Telegraph Co.*, 224 U. S. 649, 661; *Boise Water Co.* v. *Boise City*, opinion just handed down, *post*, p. 84. As a property right it was assignable, taxable and alienable. Generally it is an asset of great value to such utility companies and a principal basis for credit.

2. The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself or as a consequence of some limitation imposed by the general law of the State, or by the corporate powers of the city making the grant. *Detroit* v. *Detroit Street Railway, supra; Louisville* v. *Telephone Co., supra; People* v. *O'Brien*, 111 N. Y. 1, 42; *Woodhaven Gas Light Co.* v. *Deehan*, 153 N. Y. 528; *Mobile* v. *L. & N.*

Railroad Co., 84 Alabama, 115; *Town of Arcata* v. *Arcata Railroad Co.*, 92 California, 639; *Hudson Tel. Co.* v. *Jersey City*, 49 N. J. L. 303; Dillon Mun. Corp., 5th ed., § 1265; *Nebraska Telephone Co.* v. *Fremont*, 72 Nebraska, 25, 29; *Plattsmouth* v. *Nebraska Tel. Co.*, 80 Nebraska, 460, 466. If there be authority to make the grant and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in *People* v. *O'Brien*, *supra*, a decision accepted and approved by this court in *Detroit* v. *Detroit Street Railway*, *supra*—"The grant to the Railway Company may or may not have been improvident on the part of the municipality, but having been made and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly, when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held under the legislation and facts that the right created by the grant of the franchise was perpetual, and not for a limited term only." Dillon on Mun. Corp., 5th ed., § 1265.

3. There seems to have been no general law in Kentucky under which a telephone company could acquire the necessary street easement; nor until the enactment of § 4639-b of the Kentucky Statutes, was there any provision in the general law in regard to the acquisition of such rights in or upon the public roads outside of municipal corporations. In both cases the right to place and maintain poles and wires upon either streets or roads was dependent in the one case upon the municipal power of control over its streets, and in the other upon the power of the county fiscal courts by virtue of their control over county roads.

The original source of power over both streets and highways is the State. But this power of control is generally delegated in some form to the municipalities and county authorities of the State. Thus the county fiscal courts, by § 4306, Kentucky Statutes, are given "general charge and supervision of the public roads," etc. Concerning the power resulting from the grant by the State to control streets or public highways, the Kentucky court, in *American Car Co.* v. *Johnson County*, 147 Kentucky, 69, 71, said: "The right to grant a franchise presupposes and is based upon the right of the authority granting the franchise to control the property over which the franchise is granted or which is affected by it. For example, the fiscal court could grant a franchise authorizing the erection of poles along the highways of the county, as the fiscal court had control of the highways. And so, municipal corporations may grant franchises to use the streets and public ways of a city." Again, in *Jackson-Hazard Telephone Co.* v. *Holliday*, 143 Kentucky, 149, 150, the court said: "That the fiscal court having, as it did, under section 4306, Kentucky Statutes, the control and supervision of the public roads of the county, had authority before the enactment of section 4679-b of the Kentucky Statutes to grant the company the right to erect its poles along this road in the absence of a statute expressly giving the court such authority, is we

think settled by the case of *Cumberland Telephone & Telegraph Co.* v. *Avritt*, 120 Kentucky, 34." Section 4679-b, referred to, gives to telephone companies the right to place their poles along such roads subject to regulation by the fiscal courts, but it does not deal with the streets of municipal corporations. The right of such companies to occupy the streets of villages and cities was, therefore, dependent upon the charter powers, express or implied, under which they were organized.

Owensboro was granted a special charter in 1882, by which, among other things, it is given power "to regulate the streets, alleys and sidewalks and all improvements and repairs thereof." If the county fiscal courts had power to grant to such companies a franchise to place their poles and wires along the public roads of a county under the statute giving them "general charge" and right to "supervise" such roads, it logically follows, as stated in *American Car &c. Co.* v. *Johnson*, *supra*, that the City of Owensboro under the power to "regulate" its streets and alleys had ample authority to grant a franchise to the Telephone Company to place and maintain its poles and wires upon the streets.

The character of the business of such companies was well known. Access with their lines to the houses of their customers in the city absolutely required the right to use the public streets, either longitudinally or to cross them. By such an exertion of its power to control and regulate the use of the streets it did not authorize a new public use. Such a use was a legitimate street use and did not impose upon the owner of the fee in the street an additional burden. *Cumberland Telephone and Telegraph Co.* v. *Avritt*, 120 Kentucky, 34. Neither was the city thereby stripped of its police power over the streets. *Louisville City Railway* v. *City of Louisville*, 8 Bush, 415, 420. Nor did it undertake to grant an exclusive right. Express power to grant an exclusive street franchise has generally

been held essential. Dillon, Mun. Corp., 5th ed. §§ 1215, 1218, 1234. The grant in this case was not exclusive, and we are not called upon to deal with that question, since the ordinance here involved expressly reserves the right to make similar grants to other companies.

The great power of Congress over interstate commerce is wrapped up in the power to "regulate" such commerce. The authority of the City of St. Louis to compel the Western Union Telegraph Company to pay a rental for the maintenance of its poles and wires upon the streets of the city grew out of a charter power to "regulate" its streets and alleys. In this case (149 U. S. 465, 469), the court said:

"The word 'regulate' is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used."

In *City of Owensboro* v. *Cumberland Telephone & Telegraph Company*, 174 Fed. Rep. 739, a case involving the regulation of the rates and charges of the present appellee, the power of the City of Owensboro under its charter power to "regulate" was held by the Circuit Court of Appeals of the Sixth Circuit to amply justify the grant here involved, though its duration was not involved or considered.

That the power to "regulate" embraces power to grant to such companies the right to place and maintain their poles upon the streets has been generally held: *Pikes Peak Power Co.* v. *Colorado Springs*, 105 Fed. Rep. 1; C. C. A. 8th Circuit; *Detroit Citizens' Railway* v. *Detroit*, 64 Fed. Rep. 628, 636; C. C. A. 6th Circuit. In the latter case

it was held that a charter power to "open, close and widen streets, and to prescribe, control and regulate the manner in which the highways, streets and avenues shall be used and enjoyed," was a power broad enough to permit the city to consent to the use of its streets for such purposes by any company having the requisite franchise of a street railway company. To the same effect see Dillon, Mun. Corp., 2d ed., § 575; *Atchison Street Railway* v. *Missouri &c. Ry.*, 31 Kansas, 661; *Southern Bell Telephone Co.* v. *Mobile*, 162 Fed. Rep. 523, 562; *State* v. *Murphy*, 134 Missouri, 562; *Brown* v. *Duplessis*, 14 La. Ann. 842; *Chicago, B. & Q. Railway* v. *Quincy*, 136 Illinois, 489; *New Castle* v. *Lake Erie &c. Railroad*, 155 Indiana, 18.

4. It is next insisted that the grant is limited to the life of the corporation that accepted it. The assumption that this life was limited to twenty-five years from the date of the organization of the grantee corporation is erroneous. The articles of agreement did provide that the company should terminate in twenty-five years, but as this was an agreement of the stockholders *inter sese*, it was competent for them, if the general incorporating act under which the company was organized permitted, to extend its life. This is precisely what the Kentucky act under which the company was organized permitted. Thus it provided that corporations organized for any work of internal improvement could be formed to endure for fifty years, and those formed for other purposes, for twenty-five years. General Statutes of Kentucky 1888, c. 56, § 7, p. 764. But the same act provided that in either case the term might be extended by action of three-fourths of the stockholders. Thus, if it be assumed that the grant was limited to the life of the grantee, that life was capable of extension at the will of the stockholders, and an extension did occur as contemplated. But this ordinance was to the Cumberland Telephone Company and its assigns. It vested a

property right, capable of passing to an assignee, and did in fact pass to the present consolidated company, whose life, by express action of its entire body of stockholders, is for two hundred years. That a corporation is capable of taking a grant of street rights of longer duration than its own corporate existence is the settled law of this court: *Detroit* v. *Detroit Street Railway, supra; Louisville* v. *Cumberland Telephone & Telegraph Co., supra.*

The case of *St. Clair County Turnpike Company* v. *Illinois*, 96 U. S. 63, has been cited and relied upon as deciding that a grant to a corporation is limited in duration to the life of the grantee. If the case is to be regarded as holding the wide doctrine for which it has been cited, it is in conflict with the cases cited above. But it does not go so far as claimed. The grant there involved was of the right to extend an existing turnpike over a certain dyke and county bridge, and to maintain a toll-gate upon the extension. The company to which this additional right was given had been incorporated for a term of twenty-five years. The grant was to the particular company by name and was not to its assigns or successors. This court likened such a grant to a grant at common law to a natural person without words of restriction, which, said the court, "creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists." The grant here involved was to the corporate grantee, its assigns and successors, and falls under the principle of the cases cited above.

5. It is next said that the power to grant found in the city charter is coupled with the power to amend or repeal. The tenth section of the city charter provides that "The Common Council shall have control of the finances and all property, real and personal, belonging to the city, and shall have full power to make, publish, and repeal all ordinances for the following purposes." Then follows fifty-seven sub-sections relating to the legislative power

of the council. The twenty-seventh section gives the council the power "to regulate the streets, alleys and sidewalks and all repairs thereof."

The power to be a corporation and to conduct a telephone business did not come from the city, nor could it. The only thing which the ordinance pretends to do is to grant an easement in the streets which, as we have already shown, was an unlimited right to place and maintain poles and wires upon the streets, subject, however, to the police power of the city. This repealing ordinance, though it purports to be an exercise of the police power in the "whereas" clause, proceeds immediately to contradict the assertion that the poles and wires are a "nuisance" by the proviso giving the company an opportunity to purchase the right to continue the use of the streets under conditions "to be prescribed by ordinance," upon request of said company. It is a plain attempt to destroy the vested property right under which a great plant had been installed and operated for more than twenty-five years. When that grant was accepted and acted upon by the grantee it became a contract between the city and the telephone company, which could not be revoked or repealed, unless the power to repeal was clearly and unmistakably reserved.

The sixth section of the granting ordinance provides that, "This ordinance may be altered or amended as the necessities of the city may demand." This is no more than a reservation of the police control of the streets and of the mode and manner of placing and maintaining the poles and wires incident to the unabridgeable police power of the city. See *Grand Trunk Railway* v. *South Bend*, 227 U. S. 544. It does not reserve any right to revoke or repeal the ordinance, or to affect the rights therein granted. Nor does the city attempt to justify its action in requiring the poles and wires to be removed from the streets under that section, but solely upon the general

power in the city charter "to make, publish and repeal ordinances." This general power to repeal ordinances obviously refers to ordinances which are legislative in character, and exertions of the governmental power of the municipal council,—a power in its nature not to be abridged by irrepealable ordinances. *Baltimore* v. *Baltimore Trust Co.*, 166 U. S. 673; *Grand Trunk Railway* v. *South Bend, supra.* The power to repeal, alter and amend such ordinances is one which inheres in the power to legislate, and its mention is pure surplusage.

To construe this general power of repeal as a reservation of a power to revoke or destroy contractual rights which have vested under an ordinance, which, upon its face, makes no such reservation, would be to place every contract made by the city by virtue of an ordinance, legislative in form, subject to the mercy of changeable city councils. In the absence of an express reservation in the contractual ordinance, or an express delegation of power to revoke contracts under such ordinances, we think no such extraordinary power is to be implied. *Ashland* v. *Wheeler*, 88 Wisconsin, 607, 616.

Much the same question arose in *Hudson Telephone Company* v. *Jersey City*, 49 N. J. L. 303, where the right granted was held to be irrevocable under a similar power. *Greenwood* v. *Freight Co.*, 105 U. S. 13, is not in point. That case involved the repeal by the Massachusetts legislature of a legislative charter, under a reserved power, by general law of the State making "every act of incorporation (after a certain date) subject to amendment, alteration or repeal, at the pleasure of the legislature." That was a plain, unmistakable reservation of the right to repeal at the pleasure of the State. This clause of the charter in the instant case reserves no more than the power to repeal, as well as to make and amend ordinances, but by no means operates to convey the power to "repeal" a grant of street rights which had been accepted and had

thereby become a contract under the protection of the contract clause of the Constitution. That the right may be reserved to destroy a contract may be conceded; but when such a right is claimed, it must be clear and explicit. The contention here advanced, if conceded, would paralyze the contractual power of the city, for if it has application to this ordinance, it would equally apply to every other contractual ordinance which the city might enact, though the contract had been accepted and expenditures made.

In *Lake Roland El. Ry.* v. *Baltimore*, 77 Maryland, 352, an ordinance consenting to the laying of a double track over designated streets was involved. This ordinance could not become effective until confirmed by the legislature. The confirming act contained these words: "The said Mayor and City Council to have the same power and control hereafter in reference to the enforcement, amendment or repeal of said ordinance as it has or would have in respect to any ordinance passed under its general power." Later this ordinance was in part repealed, and the repeal was held valid upon the ground that the control of the city over its streets was a legislative power and that the council could not consent to any rights therein which were not revocable, although the city might be liable for damages. The opinion does not rest upon the theory that any right of repeal was specially reserved in the ordinance or by the confirmatory act. The validity of the repeal was put upon the right to repeal every ordinance legislative in character. The case is out of line with the great weight of authority in respect to the irrevocable character of property rights vested under an ordinance when the right to revoke is not expressly reserved.

In *Baltimore Trust Co.* v. *Baltimore*, 64 Fed. Rep. 153, Circuit Judge Goff refused to follow the case, holding that the question of contract or no contract under such an ordinance was a Federal question, and that the confirmatory legislation reserved no right of repeal, and that

none existed under the general right to repeal ordinances. In the same case, 166 U. S. 673, the decree of Judge Goff was reversed upon the sole ground that the requirement of the so-called repealing ordinance that the railway company should maintain but one track on one of the designated streets was a legitimate exercise of the police power, and not a substantial change of the contract. The case is so explained and distinguished in *Grand Trunk Railway* v. *South Bend, supra.*

6. In June, 1900, the Cumberland Telephone and Telegraph Company consolidated with the Ohio Valley Telephone Company, likewise a Kentucky corporation, under authority of the Kentucky act of April 5, 1893 (Acts of 1891, 1893, c. 171, p. 612). Although the separate existence of the constituent corporations was terminated and they became a single corporation, the consolidated company was, by express provision of the act referred to, "vested with all the property, business, credits, assets and effects of the constituent corporations, without deed or transfer, and bound for all their contracts and liabilities." Being property, alienable and assignable, the street rights of the constituent companies passed to the consolidated company. The same question arose and was expressly decided in *Louisville* v. *Cumberland Telephone & Telegraph Co., supra.*

7. Finally, it was claimed that in a prior litigation in a state court, between the same parties, the ordinance of 1889 had been held to be in excess of the power of the city as nothing more than a revocable license. The suit referred to had been brought by the Telephone Company to restrain the city from placing poles and wires of an electric light system, in course of construction by the city, in such close proximity to the poles and wires of the Telephone Company as to interfere with its current. One of the defenses was that the city had no power under its charter to make the grant which it had assumed to

make by the ordinance of 1889, and that the Telephone Company was, therefore, a trespasser upon the streets. Upon a final hearing the bill was dismissed. This decree was pleaded as an adjudication of the question of the validity of the ordinance under which the Telephone Company now claims. But the judgment makes the opinion of the court filed at the time "a part of the record." That opinion shows that the court dismissed the bill because its object had failed, the city having actually constructed its lines before final decree. In reference to the issue as to the validity of the Telephone Company's street rights, the Kentucky court said: "In passing upon the question of granting or refusing the injunction, I deem it wholly unnecessary to pass upon the validity or invalidity of the ordinance discussed." The litigation, though between the same parties, is upon an entirely different cause of action. The bar of the former judgment is, therefore, confined to the questions which were actually litigated and decided in the former case, and it devolved upon the city to show in support of its plea, the cause of action being different in the present case, that the point here in issue was adjudged in the former case. *DeSollar* v. *Hanscome*, 158 U. S. 216; *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252.

We find no error in the decree of the court below and it is, therefore,

Affirmed.

MR. JUSTICE DAY, with whom concurred MR. JUSTICE MCKENNA, MR. JUSTICE HUGHES and MR. JUSTICE PITNEY, dissenting.

I am unable to concur in the judgment and opinion announced in this case. In my opinion the ordinance of December 4, 1889, granting to The Cumberland Telephone & Telegraph Company, its successors and assigns, the

right to use the streets and alleys of the City of Owensboro for the purpose of erecting poles and stringing wires thereon to maintain a telephone system, did not grant a perpetual franchise, because of the limitation upon the authority of the City of Owensboro to grant a perpetual franchise.

The case is not controlled by the previous cases in this court, such as the late case of *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, which had to do with the construction of a legislative grant to a corporation having perpetual succession and did not involve the construction of the charter of a Kentucky city such as is here under consideration.

The power to grant a perpetual franchise to telephone and similar companies desiring to use the streets and alleys of the City of Owensboro is said to be derived under § 10 of the charter, conferring upon the common council in subsection 27 the right to regulate streets, alleys and sidewalks and all repairs thereof in the city. Conceding that if this power were conferred without limitation it might authorize a grant in perpetuity of the character herein involved, the authority found in subsection 27 as well as other municipal powers are all granted to the common council by the legislature of the State upon the following terms, preceding the grant of authority: "§ 10. The common council shall have control of the finances and all property, real and personal, belonging to the city, and shall have full power to make, publish, amend, and repeal all ordinances for the following purposes, to wit." In other words the authority granted to regulate the streets is limited by the express reservation that it shall be exercised subject to the power of the city to amend and repeal any ordinance so enacted.

In *Greenwood* v. *Freight Co.*, 105 U. S. 13, wherein this court held that a grant to a street railway company subject to the limitation of the right to amend, alter or repeal was

subject to future legislation ending the right of the street railway company to operate in the streets of the city, Mr. Justice Miller, who delivered the opinion of the court, stated the origin of statutory and legislative reservations of this character enacted since the decision of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, construing corporate charters as contracts between the public authorities and the grantees, beyond legislative control and within the protection of the contract clause of the Federal Constitution. The learned Justice said (p. 20):

"It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the *Dartmouth College Case*, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation."

In view of that policy this court held that whatever rights remained to its other property the authority to run cars upon the streets of the City of Boston, being subject to the reservation, terminated upon the repeal of the ordinance.

If there is such right to repeal, the authorities are con-

clusive that it may be exercised so as to terminate the rights of the company to further use the streets. In a recent case, *Calder* v. *Michigan*, 218 U. S. 591, this court approved and reaffirmed this principle. In that case The Grand Rapids Hydraulic Company had been incorporated by the legislature of Michigan and had constructed and was then maintaining an elaborate water system. The legislature repealed the charter, reservation to amend or repeal having been made in the original act. In aid of the contention that the repealing act was void under the Fourteenth Amendment to the Constitution, it was alleged that there were outstanding bonds and a mortgage on the company's plant, including its franchise to own and operate its system; also that, the city being a competitor of the company, the city authorities had secured the passage of the repealing statute by unfair means. This court said (pp. 598 *et seq.*):

"The defendants now, on the ground that there are limits even to the operation of a reserved power to repeal, argue that we should consider these allegations. But we do not inquire into the knowledge, negligence, methods or motives of the legislature if, as in this case, the repeal was passed in due form. *United States* v. *Des Moines Navigation & Railway Co.*, 142 U. S. 510, 544. The only question that we can consider is whether there is anything relevant to the present case in the terms or effect of the repeal that goes beyond the power that the charter expressly reserves.

". . . By making a contract or incurring a debt the defendants, so far as they are concerned, could not get rid of an infirmity inherent in the corporation. They contracted subject, not paramount, to the proviso for repeal, as is shown by a long line of cases. *Greenwood* v. *Freight Co.*, 105 U. S. 13. *Bridge Co.* v. *United States*, 105 U. S. 470. *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 313, 338, 340. *New Orleans Waterworks Co.* v.

Louisiana, 185 U. S. 336, 353, 354. *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 437, 438. *Manigault* v. *Springs*, 199 U. S. 473, 480. It would be a waste of words to try to make clearer than it is on its face, the meaning and effect of this reservation of the power to repeal.

". . . The only question before us now is the validity of the judgment ousting the defendants from 'assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic Company.' This really is too plain to require the argument that we have spent upon it. We may add that it is a matter upon which the bondholders have nothing to say."

See also *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258.

It is said, however, and that seems to be the ground upon which the decision of the court upon this point rests, at last, that the reservation of the right to repeal does not clearly appear in the charter of Owensboro, as it did in the Massachusetts legislation considered in *Greenwood* v. *Freight Co.*, *supra*, and it is said that such right, when it is claimed, must be clear and explicit. To my mind the purpose of the Kentucky legislature was evidenced with perfect clearness, for I think that the same law which gave the city the right, which otherwise would have rested with the legislature alone of exercising authority over the streets, which in this case, it is held, authorized their use for telephone purposes, in unmistakable terms made such authority subject to the clearly stated and definite limitation named. Furthermore, the doctrine is well settled that legislative grants of municipal authority shall be construed most favorably to the public and against persons claiming thereunder, a doctrine sanctioned by decisions of this court. *Moran* v. *Commissioners of Miami County*, 2 Black, 722; *Citizens' Street Railway* v. *Detroit Railway*, 171 U. S. 48; *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558. Surely, if the intention of the

Kentucky legislature to reserve in the municipality the authority to repeal such grants as the one here involved is not clearly manifested, at least there is reasonable room for doubt, and such doubt must be resolved in favor of the public. If the doubt be determined in favor of the company and a grant which is not clearly in perpetuity is held to be such, the effect is to tie the hands of the municipality from obtaining revenue from the use of property held by it in trust for all its people.

It is also said that the exercise of the reserved right to repeal in cases like this will have the effect to destroy contract rights, upon the strength of which large investments may have been made. But this argument overlooks the proposition that, if the grant was made subject to the right to revoke by subsequent action of the authority which made the grant, then no contract was entered between the parties beyond the control of the reserved power of the municipality, for as Mr. Justice Miller said in the *Greenwood* v. *Freight Co. Case*, under such "a provision . . . reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation." So, if this limitation in fact existed, the right to repeal was inherent in the authority which made the grant, and the grantee is conclusively presumed to be aware of this limitation, and to make his investments subject to the exercise of the reserved right. *Calder* v. *Michigan*, *supra*. Moreover, if limited grants are to be construed into perpetuities then the control over streets for railway, telephone and other kindred enterprises of enormous value are granted to private corporations without compensation for the use of such valuable rights which belong to the municipality. Recent cases in this court have shown the great value of such privileges, and that investors are found who are willing to pay for

the privilege of using the public streets for these purposes.

A single case is cited in the opinion of the court to sustain the conclusion reached upon this branch of the case, and that is *Hudson Telephone Company* v. *Jersey City*, 49 N. J. L. 303. An examination of that case shows that it did not involve the question now under consideration. There the telephone company was organized as such under the prevailing statutes of the State and had obtained on certain conditions the permission of the municipality to use the streets in accordance with a provision in the statute that the designation of the streets to be used and manner of placing poles should first be secured. An ordinance was passed, revoking the permission, although the company had complied with the conditions, and the court held that the revoking ordinance was invalid. The court noticed the power reserved in the corporation act to repeal, suspend and alter charters, and the power of the city council to repeal ordinances. The former was held to run to the legislature solely, and it was said that there was no provision in the act authorizing the municipality to revoke its permission. Of the latter the court said that the power to repeal was a general power arising from the power to pass ordinances and existed without the express charter powers, and that such general power would not sustain the rescission of an act authorized by other legislation.

A somewhat diligent search has failed to discover cases exactly in point construing a reservation of the character herein involved. The case of *Lake Roland Elevated Railway Co.* v. *Mayor &c. of Baltimore*, 77 Maryland, 352, followed and approved in *United Railways* v. *Hayes*, 92 Maryland, 490, is, however, closely analogous. In that case the city granted a franchise to the railway company permitting it to lay tracks in the streets of the city and also to erect an elevated railway in a certain street. A statute passed to con-

firm the action of the city with respect to that part of the ordinance granting a franchise which related to the elevated railway contained a reservation to the city of "the same power and control hereafter in reference to the enforcement, amendment or repeal of said ordinance [granting the franchise] as it has or would have in respect to any ordinance passed under its general powers." This reservation was held to authorize the repeal of the grant in question. The case upon this point meets the argument made in the opinion in this case that the right to amend, alter or repeal would have existed without the statute and cannot be held to cover the grant of franchise privileges to use the streets. Undoubtedly this right of repeal would have existed, and hence its insertion was unnecessary unless it was to have some further purpose than that the law already gave, the general power of a municipality to repeal ordinances of a legislative character. We think the intention in this case was the same as in the Maryland case, to preserve in the municipality authority over the streets in the interests of the public.

In my view the case in its present attitude comes to this: The permission to place poles and string wires in the City of Owensboro was granted under a charter which expressly reserved the right to repeal by subsequent act of the municipal legislature. In the face of this authority and presumably with knowledge of it, the company has entered upon the streets and made use of them for the purposes intended. Holding its grant subject to this superior right in the city to end it, I think the subsequent repealing ordinance was within the power of the municipality.

MR. JUSTICE MCKENNA, MR. JUSTICE HUGHES, and MR. JUSTICE PITNEY concur in this dissent.